

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT

684

IN THE

United States Court of Appeals

DISTRICT OF COLUMBIA *United States Court of Appeals
for the District of Columbia*

No. 9599 FILED SEP 25 1947

Grace W. Stewart

HEARST RADIO, INC., *Appellant,*

CLERK

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

Appeal from the District Court of the United States for the
District of Columbia.

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BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the District of Columbia dismissing appellant's complaint for declaratory and incidental relief against the Federal Communications Commission. Appellant's complaint was filed with the District Court on February 15, 1947, and the jurisdiction of that Court was based on Section 10(b) of the Administrative Procedure Act, Act of

June 11, 1946, 60 Stat. 243, 5 U. S. C. § 1009, and the Federal Declaratory Judgment Act, Act of June 14, 1934, 48 Stat. 955, 28 U. S. C. § 400, as well as Section 24(1) of the Judicial Code, 28 U. S. C. § 41(1). (Joint App. 2) The jurisdiction of this Court is based on its general appellate jurisdiction and Section 128 of the Judicial Code, 28 U. S. C. § 225(a). The order dismissing appellant's complaint was entered in the District Court on July 11, 1947 (Joint App. 29), and appellant's Notice of Appeal was filed in that court on the same day (R. 32). A certified copy of the record in the District Court was filed in this Court on August 20, 1947.

STATEMENT OF THE CASE.

I.

The instant proceeding was commenced by the filing of a complaint for declaratory and incidental relief on February 15, 1947, in the District Court. On February 19, 1947, the District Court, Justice T. Alan Goldsborough, issued a preliminary injunction after notice and hearing restraining the Commission from taking further proceedings including the holding of any hearing in connection with a pending application for renewal of license for Radio Station WBAL, *pendente lite*, and further ordered that the cause be advanced and set down promptly for trial. On April 4, 1947, the defendant below, appellant here, Federal Communications Commission, filed a motion to dismiss the complaint. Argument on this motion was had before the District Court (Mr. Justice Proctor) on 21st day of April, 1947. On July 3, 1947, Mr. Justice Proctor filed a memorandum opinion (Joint App. 27) holding that the motion should be granted, and, on the 11th day of July, 1947, entered an order dismissing the complaint and dissolving the preliminary injunction theretofore issued. Prior to the entering of said order, the Court heard counsel for the parties in chambers on the question of continuing the preliminary injunction pending the hearing and determination of the instant appeal. Two motions for the convening of three-judge court,

filed by the Commission, were heard and denied respectively by Mr. Justice Goldsborough and by Mr. Justice Proctor. (Joint App. 21, 24, 26, 29)

II.

The facts upon which the relief was sought in the instant proceeding, as set out in the complaint, were admitted in the Court below and are admitted here for the purpose of this appeal. For the convenience of the Court, the complaint is set out in full in the text inasmuch as the facts alleged therein are controlling upon the parties and the Court in the hearing and determination of the instant appeal.

COMPLAINT FOR DECLARATORY AND INCIDENTAL RELIEF.

1. Plaintiff is Hearst Radio, Inc., (hereafter referred to as "Hearst"), a corporation duly created and existing under the laws in the State of Delaware and doing business as licensee of Radio Station WBAL in the city of Baltimore, Maryland. Defendant is the Federal Communications Commission, (hereafter referred to as the "Commission"), an agency of the United States Government, having its principal offices in Washington, D. C. Jurisdiction of this case is conferred by Section 10(b) of the Act of June 11, 1946, Public Law 404, 79th Congress, Chapter 324 ("Administrative Procedure Act"), and 48 Stat. 955, 28 U. S. C. 400, as well as 28 U. S. C. 41 (1). The amount involved, exclusive of interest and costs, is in excess of \$3,000.

2. Under date of March 7, 1946, the Commission published a report entitled "Public Service Responsibility of Broadcast Licensees" (which is commonly known as, and will hereafter be referred to as, the "Blue Book"). This report has received wide circulation. Initially distributed by the Commission to the licensees of all existing broadcast stations, the holders of construction permits for such stations, applicants for license or construction permit, and others, it was reprinted by the National Association of Broadcasters and redistributed on an even broader basis. The report has been the subject of widespread public discussion, of public speeches, forums, round-tables, debates,

etc., many of which were broadcast, some over national networks. It has been the subject of articles appearing in periodicals of general circulation as well as trade publications. Heated controversy engendered by the Blue Book has centered upon questions of the propriety and legality of the issuance of the report by the Commission and upon the wisdom of the conclusions reached and the policies set forth in it with respect to the programming of radio stations. The statements contained in the Blue Book relating to the operation of specifically named stations have been widely accepted as true by the general public, the press and the radio broadcasting industry.

3. Section D of Part 1 (pages 14-19) of the report (a copy of which section is attached hereto as Exhibit A and by this reference made a part hereof as though set out at length herein)* purports to describe the operation of Radio Station WBAL by Hearst and to contrast that operation adversely to Hearst with the operation of the station under prior ownership. The statements in said Section D tend to expose Hearst to public shame, obloquy, contumely, odium, contempt, ridicule, aversion, degradation and disgrace, and tend to destroy the confidence of the public and those with whom the station does business in the radio industry and otherwise in Hearst's ability to continue to operate Station WBAL. Illustrative of the fact that said Section D has been so construed are the following statements. (a) Charles A. Seipmann, a former employee of the Commission, charged with important responsibilities in connection with the drafting and editing of the "Blue Book", in an article published in "The Nation" December 7, 1946, page 644, entitled "Radio's Operations Cross-roads" succinctly summarizes the comparison in Section D in the following words: "So marked was the change in tune that the station's (WBAL's) record in 1944 was cited in the "Blue Book" as a prize example of gross default". (b) In a book entitled "the Radio Station" by Jerome Sill, published in 1946, there is contained an analysis of the

*Exhibit A to the complaint appears in the Joint Appendix, pp. 14-21.

Blue Book which makes the following reference (page 121) to the discussion of WBAL:

"Affirmatively, the report focuses a spotlight on a situation that, in some instances, deserves the notoriety that will accrue. The Commission, in outlining the operations of stations in Philadelphia, Baltimore and Toledo have pointed out abuses of the public trust that are to be condemned. And, in fact, it is most likely that the industry does condemn such operations." (c) In a full page advertisement offered to the daily newspapers of general circulation in Baltimore, the Public Service Radio Corporation (an applicant for the facilities of Station WBAL) referring to said Section D stated:

"The Federal Communications Commission has condemned William Randolph Hearst's management of WBAL. From its report, the conclusion is inescapable that Hearst has:

SERVED THE PUBLIC LAST

Neglected Religion and Education

Ignored Baltimore's Own Offerings and Needs

Had Too Many Commercials."

4. The defamatory description of Hearst's operation of WBAL in said Section D is a false and distorted misrepresentation based upon deliberate suppression of facts found in the Commission's own records, which prove the description of WBAL's operation under prior ownership completely false and the description of its operation under Hearst inaccurate and misleading. (a) The Blue Book bases its description of the operation of WBAL under its prior ownership (The Consolidated Gas, Electric Light and Power Company of Baltimore) on a speech made by the President of the company on the night it commenced broadcasting in November 1925, and upon a "Description of WBAL, Baltimore," submitted to the Federal Radio Commission in 1927. The President is quoted as stating that the company did not propose to commercialize the station's operation and the quoted "Description" states

that 90% of its programs were rendered by its own studio organizations and that its operation closely approximates that of a public enterprise. The Blue Book does not mention the fact, revealed by the Commission's own files, that the first application filed with the Federal Radio Commission in 1927 indicated that the station would no longer operate on a non-commercial basis but would sell time, and that in subsequent renewal applications found in the Commission's files, it is shown that commencing in 1927 the station not only sold time for advertising, but prior to the transfer to Hearst, it was a self-supporting enterprise. The Blue Book does not mention either the facts that in 1932, the station represented to the Radio Commission that 90% of its time was devoted to network broadcasting and 2½% to mechanical reproductions, leaving a maximum of only 8½% available to the station's own studio organizations. The applications filed with the Commission from 1929 until 1935, when the station was transferred to Hearst, show that from a maximum of 42.9% of time available for programs by WBAL's own studio organizations or other live talent, the amount of such available time diminished steadily and for the last two years preceding transfer to Hearst there was an average of less than 5% available for any local live talent broadcasting. In one license period the Commission's records show that only one-tenth of 1% was available for such local live programs. In the six months immediately preceding the transfer to Hearst less than 3½% of the station's time was available for the station's live programs.

(b) The Blue Book states WBAL's "present mode of operation is in marked contrast to its operation described above under the previous licensee," and then it proceeds to make a partial analysis of an arbitrary week of WBAL's programming to show a reduction in the amount of time available for local live and public service programs under Hearst operation. In fact, as shown by the Commission's files, during the first license period under Hearst the time devoted to local live programs increased from less than

3½% under the Gas Company to more than 14½% under Hearst. During the whole time of operation under Hearst, as shown by the Commission's files, this time exceeded 20%. The facts in the Commission's files with respect to the operation of WBAL up to December 1945, less than 2 months prior to the issuance of the Blue Book, demonstrated that the arbitrary week of operation of the station under Hearst was not typical and in addition that the type of analysis utilized by the Commission emphasized certain features and suppressed others to Hearst's disadvantage. Published Commission records show that the operation of WBAL during the week selected by the Commission compared favorably with the operation of other similar broadcast stations in the United States, whose renewal of license applications were granted by the Commission without hearing.

(c) In addition the Commission completely disregarded important relevant factors known to the Commission, such as the growth of radio broadcasting as an advertising medium from 1925 to 1945. (Gross radio billings according to the best available estimate totalled \$4,828,000 in 1927, of which \$3,383,000 were national network. (WBAL did not obtain a network affiliation until 1927.) In 1944 gross billings were \$391,877,000, nearly 80 times as much.) The growth of network operation and public demand for national commercially sponsored programs and the difference between a 3-5 kw part-time station* (such as WBAL is and has been since December 1941), which make quantitative comparison of advertising and programming service completely meaningless in important aspects bearing upon the evaluation of the service rendered were also ignored.

5. Hearst twice petitioned the Commission to withdraw or correct the Blue Book and was twice denied relief. Hearst was not even permitted oral argument on its petition. The Commission in its annual report to the Congress for the Fiscal Year ended January 30, 1946, transmitted

*The words "and a 50-kw. unlimited time station" were omitted through typographical error.

under date of February 8, 1947, refers (page 4) to the Blue Book, as the Commission has since it was published, as the Commission's definitive statement of policy on the programming of broadcast stations and on the consideration of applications for license and renewal therefor to operate such stations.

6. In addition to the damage done Hearst's business and reputation by the "Blue Book" and by the Commission's refusal to withdraw or correct the false and defamatory Section D of Part 1 thereof, there has resulted a deprivation of Hearst's right, implicit in the Communication's Act of 1934 as amended, and explicit in Section 9(b) of the Administrative Procedures Act, to have its application for renewal of license of WBAL acted upon with reasonable dispatch, and serious jeopardy to its right to have such application acted upon fairly and in accordance with law.

7. (a) The regular license under which Hearst was operating WBAL expired April 30, 1945. Application for renewal of that license for the period May 1, 1945, to May 1, 1948, was filed by Hearst on February 16, 1945. On April 10, 1945, the Commission announced a policy of "a more detailed review of broadcast station performance when passing upon applications for license renewals." At the same time it instituted a study of the subject which culminated in the issuance of the "Blue Book" on March 7, 1946. All broadcast stations whose regular licenses expired between April 10, 1945, and March 7, 1946, were continued in operation by the Commission on temporary authorizations. The renewal applications filed by all of such stations (some 323) were held in a pending file by the Commission until the stations filed additional data requested by the Commission subsequent to the issuance of the "Blue Book". Of all the more than 320 stations then operating under temporary authorizations and having renewal applications pending before the Commission, WBAL alone was singled out by the Commission on February 15, 1946, and its renewal application designated for hearing. On March 15, 1946, the Commission announced that the

hearing would be held on April 15, 1946. On March 29, the Commission on its own motion postponed the hearing to July 1, 1946. On June 21, the Commission on its own motion again postponed the hearing to October 1, 1946. On September 25, the Commission again on its own motion postponed the hearing to December 2, 1946. On November 20, the Commission again postponed the hearing to January 13, 1947 by an order which also consolidated for hearing the WBAL renewal application and an application which had been filed by Public Service Radio Corporation for the facilities of WBAL. By order dated December 20, the Commission postponed the hearing to February 24, 1947, and by order dated February 11 the Commission postponed the hearing to February 25, 1947. Prior to the order of November 20, 1946, for a consolidated hearing of the Hearst and Public Service Radio Corporation applications, the Commission had specified no issues for the hearing on the WBAL renewal application.

(b) By press release issued September 20, 1946, the Commission disclosed that its reasons for designating the renewal application for hearing on the 15th of the preceding February were the aforementioned allegations relating to WBAL continued in the "Blue Book". In this same press release the Commission announced that it was on that date designating for hearing the renewal applications of six stations (KBIX, KGFJ, KMAC, KONO, WBIG, and WTOL) because the Commission was of the opinion that the statistical and other data before the Commission concerning the program service rendered by these stations indicated that these stations were not rendering a well-rounded program service in accordance with their license obligations to operate in the public interest. At the time the WBAL renewal application was designated for hearing, the Commission did not have before it the statistical and other data thereafter submitted by WBAL at the Commission's request in response to the requirement first announced by the Commission in the "Blue Book". (The last of such data was submitted on June 24, 1946.) This

data was required by the Commission not only of all of the stations whose renewal applications were pending at the time of the issuance of the Blue Book but also of all stations whose renewal applications have thereafter been filed as a condition precedent to Commission action upon such applications, either to designate them for hearing or to grant them (the single exception being the WBAL renewal application which was designated by the Commission for hearing prior to any request for submission of the same.)

8. On September 17, 1946, some three months after Hearst complied with the Commission's last request for data to be considered in connection with the WBAL renewal application and three days before the Commission announced that it was current in the processing of renewal applications, Public Service Radio Corporation filed an application requesting a construction permit for radio broadcast station to operate on 1090 kc, 50 kw power, directional antenna, unlimited hours, in Baltimore, Maryland, the power, hours of operation, and frequency assigned to WBAL. The Commission had not on that date announced any further action on the WBAL renewal application on the basis of the data submitted at the Commission's request subsequent to the issuance of the "Blue Book", which data demonstrated that the renewal application should have been granted without hearing.

9. Public Service Radio Corporation, the sole stockholders of which at the time of the filing of its application were Drew Pearson and Robert Allen (the application was later amended to show that some 22½% of the corporation's stock had been bought or subscribed for by others), filed with its application a petition requesting that a hearing on its application be held in consolidation with the pending WBAL renewal application. Opposition to this petition was filed by Hearst on the grounds (1) that it did not meet the requirements of the applicable rules of the Commission, (2) that Hearst was entitled to a determination of the merits of its renewal application supplemented by the data required by the Commission, to be advised of

the reasons why its application has been designated for hearing in February, 1946, and to an opportunity to meet them by appropriate petition under the Commission's regulations without regard to the pendency of the application of Public Service Radio Corporation, and (3) that in any event the applications raised the unrelated questions (a) whether Hearst should receive a regular license to operate WBAL for the period ending May 1, 1948, and (b) whether Public Service Radio Corporation should be authorized to construct a station which could not commence operation until some time subsequent to that date. The Commission by its abovementioned order of November 20, 1946, granted the petition to consolidate without giving any reasons therefor and specified issues for the hearing relating solely to the comparative qualifications of Public Service Radio Corporation and Hearst to operate a station in Baltimore on 1090 kc, 50 kw power, directional antenna, unlimited hours and the relative merits of the programming and technical service proposed by each. Thereafter on December 13, 1946, Hearst filed a petition requesting reconsideration of the Commission's order of consolidation, requesting inter alia: (a) that the pending WBAL renewal application be granted forthwith on the ground that the Commission's specifications of issues for the consolidated hearing, which raise no question concerning the granting of the renewal application other than questions relating to the pending application of Public Radio Service Corporation, demonstrated that the Hearst renewal application should have been granted prior to the filing of the Public Service Radio Corporation application; and (b) that the Commission make a complete investigation of the false, distorted and misleading Blue Book comparative discussion of the operation of WBAL under Hearst and its prior ownership, make an appropriate retraction of the unfair accusation against the ownership of the station by Hearst and take appropriate action with respect to the person or persons responsible. The Commission denied this petition by order dated December 20, 1946, giving as its reasons for refusing

a retraction or correction of the Blue Book a statement to the effect that the granting or refusal of Hearst's renewal application for WBAL would be based upon the record made at the scheduled consolidated hearing. On January 24, 1947, Hearst filed a petition for correction of the Commission's "Blue Book" and for stay of further proceedings on the Public Service Corporation application pending such action on the ground that the damage to Hearst resulting from the defamatory statements in the "Blue Book" and the Commission's refusal to correct them went far beyond the matter of prejudice in the scheduled hearing on its renewal application and that even the granting of such application on the basis of the hearing record would not be an adequate substitute for a formal correction of the "Blue Book". The basis for requesting a stay of further proceedings on the Public Service Corporation application was the admitted fact that such application was filed because of the Blue Book condemnation of Hearst's operation of WBAL. It was pointed out that the Commission's discriminatory action in designating the WBAL renewal for hearing in February, 1946, coupled with the unjustified condemnation of Hearst's operation of Station WBAL and the unwarranted delay of the Commission in giving further consideration to the renewal application after the filing of the additional data required by the Commission, which induced the filing of the Public Service Corporation application, should be rectified insofar as the Commission was able to do so before any further proceedings in furtherance of the Public Service Corporation application were taken. This petition was denied by the Commission on February 8, 1947, by order stating that the denial was based on the reasons given in the aforementioned memorandum dated December 20, 1946.

10. The Commission's treatment of the renewal applications of the six stations referred to in paragraph 7 above demonstrates the unfair and prejudicial discrimination to which Hearst has been subjected as a result of the "Blue Book" condemnation in the matter of a renewal applica-

tion of Station WBAL. Three of such stations (KBIX, WIBG and KGFJ) have since been granted regular renewal on petitions for reconsideration and grant without hearing. Two (KONO and KMAC) are awaiting decision on pending petitions for reconsideration and grant without hearing. The remaining one (WTOL) was permitted to go to hearing on issues relating solely to its past operation. Despite the fact that there is pending an application, which was on file more than twenty days before such hearing for the facilities of WTOL, similar to the application of Public Service Radio Corporation for the facilities of WBAL, WTOL was not required to proceed in a consolidated hearing.

11. In addition to the above direct damage and prejudice by reason of the improper condemnation contained in the "Blue Book" damage has resulted to Hearst in its endeavor to obtain a construction permit for a frequency modulated broadcast station in Baltimore. Delay by the Commission in acting upon Hearst's application for such a station because of the "Blue Book" charges has resulted in all other competing broadcasting stations in Baltimore requesting such authorization receiving construction permits for frequency modulation stations and Hearst being forced into a comparative hearing with two other applicants for the single remaining frequency allocated for use in Baltimore.

12. Refusal of the Commission to withdraw the "Blue Book" charges against Hearst and to conduct an investigation to determine the identity of the persons responsible for the deliberate distortions of fact contained therein, will result not only in Hearst being severely prejudiced in any further proceedings on its renewal application for WBAL by reason of the fact that Commission personnel participating in such proceedings will inevitably be influenced by the "Blue Book" statements but also means that such persons or some of them may be the very ones who deliberately sought to injure Hearst through the publication of the "Blue Book".

WHEREFORE, plaintiff prays that the court adjudge:

(1) that Hearst Radio, Inc. is entitled as a matter of legal right to a withdrawal of the unwarranted charges and misrepresentations contained in Section D of Part 1 of the Federal Communications Commission's Report on Public Service Responsibility of Broadcast Licensees.

(2) that Hearst Radio, Inc. is entitled as a matter of legal right to a correction or retraction of the "Blue Book" insofar as it falsely condemns Hearst Radio Inc., prior to any further Commission consideration of or action upon its pending renewal of license application for Radio Station WBAL, and

(3) that Hearst Radio, Inc. is entitled as a matter of legal right to have its application for renewal of license of Station WBAL considered and acted upon by the Commission without regard to any factors resulting from the false and unwarranted charges against it contained in the "Blue Book".

It is further prayed that the court take appropriate action to stay any further proceedings by the Federal Communications Commission in connection with the pending renewal application of Radio Station WBAL, *pendente lite*.

STATUTES INVOLVED.

The statutes involved in this appeal are the Administrative Procedure Act and Section 402(b) of the Communications Act of 1934, as amended. Applicable sections of these statutes are set forth in the Appendix hereto.

STATEMENT OF POINTS.

1. The District Court erred in holding that appellant had not exhausted its administrative remedies despite the fact it had twice requested and twice been refused relief and despite the fact that no proceeding pending before the Commission involved any issue the determination of which would afford the relief sought.

2. The District Court erred in holding that the judicial determination of appellant's right to be free from injurious

false statements or the granting of the preliminary injunction prayed would involve any improper judicial interference with the Commission's administrative functions.

3. The District Court erred in holding that appellant's contingent right of appeal under Section 402(b) of the Communications Act constituted a barrier to the instant suit.

4. The District Court erred in dismissing the complaint notwithstanding the clear right of appellant to maintain it and the court to entertain it under the provisions of the Administrative Procedure Act.

SUMMARY OF ARGUMENT.

The conclusion of the court below that appellant had not exhausted its administrative remedies before the Commission is clearly erroneous in view of the fact that there is not now and was not at the time of the filing of the complaint any proceeding pending before the Commission the determination of any issue of which would afford appellant the relief it seeks in the instant suit, and in view of the further fact that appellant sought by all available means to obtain from the Commission the relief sought in the instant suit and was finally refused not only the relief, but even a hearing or argument on its petitions for such relief. Even as to the prayer for injunction *pendente lite* to restrain certain proceedings before the Commission in which appellant's qualifications as a licensee of a radio station are in issue, until appellant's right to have the serious false charges levelled against it by the Commission judicially determined to be false, in order to preserve and protect appellant's right to a fair hearing, the court below erred in holding that the instant suit sought to obtain improper judicial intervention in an administrative proceeding. It was plainly error to hold that the declaratory relief sought in the complaint which involved a judicial determination of matters not in issue in any Commission proceeding involved any improper judicial intervention in the administrative process. Section 402(b) of the Communications Act

provides a remedy for appeal by appellant only in the event an application for a license or renewal of license is denied appellant by the Commission, and the issues on such an appeal are limited to a determination of whether such denial was arbitrary or capricious. It does not afford any relief against false accusations levelled by the Commission outside of the proceedings on any such application except to the extent that such false allegations would demonstrate a prejudice or bias precluding a fair hearing. In any event said Section 402(b) does not preclude the District Court from taking jurisdiction over the instant complaint under authority of the Administrative Procedure Act.

The Administrative Procedure Act confers upon appellant the right to seek relief by way of declaratory judgment in the District Court against the legal wrong inflicted by the publication of injurious false statements by the Commission. The legislative history of that Act makes it clear beyond dispute that the plain and unambiguous language of the statute was intended by the Congress to mean precisely what it says.

ARGUMENT.

I.

The Grounds Given by the Court below for Dismissing the Complaint are Erroneous.

The grounds upon which the court below rested its order dismissing the complaint herein are succinctly summarized in the following language taken from the court's Memo Opinion (Joint App. 28):

“Granting of the relief prayed would, in my opinion, constitute an improper interference with procedural steps of the Communications Commission in the course of a matter legally pending before it. I do not think the statutes relied upon by plaintiff lend any authority for such interference, even assuming *arguendo* that the Commission acted erroneously in issuing the alleged libelous report. Courts cannot stand in constant watch and supervision over proceedings before governmental

agencies to prevent some erroneous or wrongful action, any more than appellate tribunals can assume to control on the spot the actions of the trial courts. Practical considerations require that the aggrieved party go on with the case. If in the end it turns against him, he may resort to such methods of judicial review as the law allows. In short the plaintiff must adhere to the established rule of exhausting its administrative remedies. Here Section 402(b) of the Communications Act affords the means for judicial review."

It is clear from the above statement that the court predicated its decision on one or more of the following three assumptions:

- (a) That there is or was a proceeding pending before the Commission which would result in further Commission action, either to correct or retract the challenged Blue Book allegations, or to refuse such correction or retraction;
- (b) That further steps should be or could have been taken before the Commission to obtain a correction or retraction of such statements, notwithstanding that there are no proceedings pending in which such relief may appropriately be requested;
- (c) That the court was being asked to intervene prematurely in a pending administrative proceeding to grant relief, the right to which should only be judicially determined in proceedings instituted after the entry of a final determination in some proceedings pending before the Commission.

We will show that none of these three assumptions is tenable, and that, therefore, the dismissal of the complaint herein was erroneous.

(A) Appellant exhausted all administrative remedies before filing the complaint.

- (1) *There is no proceeding pending before the Commission in which relief can be obtained.*

There is no proceeding of any kind now pending (nor was there any at the time of the filing of the complaint herein) before the Commission in which the allegations of the complaint are in issue. The complaint does not seek to obtain a judicial determination as a substitute or alternative for, or as a means of preventing, a Commission determination of any matter properly pending before the Commission. The proceeding before the Commission to which the court below referred is not one in which appellant has been charged with the allegations of the "Blue Book," and is being given a hearing by the Commission to combat the false charges. On the contrary, it is a proceeding which, although it never would have arisen but for the false charges, has issues so restricted that a determination of the truth or falsity of the charges will not be relevant to a determination of the specified issues.

The admitted allegations of the complaint (Joint App. p. 10) unambiguously demonstrate that the only issues in the pending renewal of license proceeding before the Commission relate to the comparative qualifications of appellant and a corporation applying for its licensed facilities to operate a radio station in Baltimore. They do not purport in any way to afford appellant a hearing on the truth or falsity of the charges levelled against it by the Commission in the Blue Book. These charges relate to activities and policies of appellant and the predecessor license of Station WBAL, going back over a period of some twenty years, and are completely unassociated with any issues involved in any proceeding now pending before the Commission. It is clear, therefore, that if the court below relied on the assumption that any proceedings now pending before the Commission would result in a formal Commission determination as to the truth or falsity of the Blue Book allega-

tions or lead to any decision in which that issue would be relevant, the court was factually in error.

(2) *Proceedings seeking relief were finally terminated by the Commission.*

The decision of the court cannot be any better supported on assumption (b) above, for appellant has taken every step open to it before the Commission to obtain a correction or retraction of the injurious false statements contained in the "Blue Book."

The appellant twice petitioned the Commission to correct or retract these injurious false statements. The Commission twice refused to do so. It did not set either of these petitions for hearing (it, in fact, refused even to hear argument on the matter), nor did it provide any further procedural steps for obtaining such relief from it. Neither the Communications Act nor the Commission's Rules and Regulations afford any further scope for administrative relief. Short of repetitious requests for reconsideration of relief twice refused, no method is open to appellant even to solicit, much less obtain, relief at the hands of the Commission.

We have shown that if the court below relied on the assumption either that there is a pending proceeding before the Commission which would provide a vehicle for obtaining a correction or retraction of the injurious false statements in the "Blue Book," or on the assumption that independently of any pending proceeding all possible steps had not been taken to obtain such relief, its decision is factually erroneous.

The third assumption, namely that the granting of the relief prayed for in the complaint would constitute an unwarranted and premature interference with the administrative process, is equally erroneous. At the outset it is obvious, since the relief prayed does not, as shown above, involve a request that the court determine an issue now before the Commission for determination in any pending proceeding, the only conceivable interference with the ad-

ministrative process which could result would stem from the granting of the prayer for preliminary injunction. Before demonstrating that this prayer does not involve any improper judicial interference with the administrative process, it should be emphasized that at most a contrary conclusion would only support a refusal to issue the preliminary injunction, and would not in any way justify a refusal to grant the substantive relief prayed in the complaint.

- (3) *The preliminary injunction prayed would not constitute an improper judicial interference with the administrative process.*

It is important to note that although the complaint herein requests a preliminary injunction restraining the Commission from further proceedings in connection with a pending application for renewal of license of appellant's broadcast station WBAL, no permanent injunctive relief is prayed. This *pendente lite* relief is predicated on the necessity for the substantive relief as a prerequisite to appellant obtaining a fair hearing in any Commission proceedings. Unless a correction or retraction of the false "Blue Book" charges is obtained prior to a hearing or further proceedings by the Commission in connection with any application in which appellant's qualifications to be a licensee is in issue, whether or not in a proceeding where a comparison of qualifications of competing applicants is involved, it is inevitable that such hearing or other proceedings will be prejudicially affected by the fact that all Commission personnel involved will necessarily consider appellant and all of its representations in any such proceeding in the light of the false statements of fact and conclusions contained in the "Blue Book." It is obvious that in any proceeding where the only issue is the relative qualifications of appellant and another, the prejudicial effect of the uncorrected, unretracted condemnation contained in the "Blue Book" will profoundly affect employees of the Commission upon whose recommendations and actions the Commission

will necessarily rely in the ultimate disposition of the application. Of almost equal importance is the profound effect that an official condemnation issued by the Commission will have upon various persons and organizations whose testimony and support of one or another competing applicant is customarily given great weight by the Commission in deciding similar matters. If the condemnation is justified, it is obviously a burden that appellant should carry into any Commission hearing in which its qualifications are in issue. If, as is admitted by the motion to dismiss, the condemnation is based on false statements, appellant is entitled to have their falsity publicly demonstrated and judicially determined, if its opportunity for a fair hearing is to be preserved.

Moreover, the injurious false statements in the "Blue Book" have caused, and are continuing to cause, appellant serious injury in its business and reputation, quite apart from the fact that they preclude appellant from obtaining a fair hearing before the Commission in any matter on which appellant as the licensee of and applicant for radio facilities, may be required to deal with the Commission. Certainly appellant should not be required to wait for relief against this injury until after the Commission has decided the pending renewal application. Obviously the Commission will not be hampered in reaching a correct decision in that proceeding by having the truth with respect to the injurious false statements in the "Blue Book" judicially declared. It is most important to bear in mind that appellant is not seeking in this proceeding to obtain a permanent injunction of the hearing now scheduled by the Commission, and that its request for an injunction *pendente lite* is solely for the purpose of insuring that this hearing, if and when it does take place, will not be an unfair hearing conducted in a forum pervaded by unfounded prejudice and bias against appellant.

(B) Appellant's contingent right of appeal under Sec. 402(b) of the Communications Act is not a bar to the instant suit.

The fact pointed out in the above quoted section of the opinion of the court below that appellant would have a right of appeal under Section 402(b) of the Communications Act in the event its renewal application for WBAL is denied, in no way justifies the dismissal of the complaint. The Commission concisely stated the argument to the contrary in the court below*: "if plaintiff does not get a fair hearing it has a statutory remedy provided in Section 402(b) of the Federal Communications Act whereby the Court of Appeals can set aside said action." Noting that this argument runs only against the prayer for preliminary injunction and does not remotely touch appellant's asserted right to a declaratory judgment as relief against the injurious false statements in the "Blue Book" the argument, even for that restricted purpose, is invalid. It is, of course, the general rule in judicial as well as administrative proceedings, that correcting of erroneous or wrongful action by appellate or judicial intervention is only appropriate after final action by the lower court or administrative agency, as the case may be. Intervention prior to final action normally does "constitute an improper interference with procedural steps" or a "meddling in the proceedings," as the court below put it. It is entirely true as a general proposition that "Courts cannot stand in constant watch and supervision over proceedings before governmental agencies to prevent some erroneous or wrongful action, any more than appellate tribunals can assume to control on the spot the actions of the trial courts." However, appellate courts do intervene to prevent proceedings by a lower court whose impartiality has been challenged. See e. g. *Barsky v. Holtzoff*, Misc. 126, U.S. App. D.C., filed June 10, 1947.

Where there are facts sufficient to indicate a pre-existing

* "Further Memorandum by Defendant Federal Communications Commission in Support of Motion to Dismiss," filed in the District Court April 24, 1947, page 8.

prejudice or the probability of unfairness on the part of a court, the parties are not required to wait until after final judgment for appellate intervention. As this court has pointed out, even in a case where a trial was apparently fair on the record and the result obviously the correct one, the judgment must, nevertheless, be set aside if the court which heard the case can be shown to have had an improper prejudice or bias such as would likely to result in unfairness. *Whitaker v. McLean*, 73 App. D.C. 259, 118 F. 2d 596 (1941). It would seem by the same reasoning to be eminently appropriate where a condition exists, which in all probability will result in an unfair administrative proceeding, to restrain that proceeding pending judicial action looking toward correction or elimination of such condition. It is therefore obvious that, however fair the Commission may appear to have been, and however correct its decision might appear to be on the record, in the event that it should ultimately deny appellant's application for renewal of license of WBAL, this court would be required to set aside the Commission's decision if it appeared that the entire proceeding was tainted because of the advance improbability of a fair hearing based on the fact that the Commission has officially published injurious false statements concerning appellant, and has refused to retract them. In such circumstances, not only appellant, but other parties to the proceeding and the public generally would have suffered expense and inconvenience to no good purpose whatsoever. *United States v. Murphy*, 19 F. Supp. 987, 990 (1937). Moreover, the statutory guarantee of a "fair" hearing would certainly require such a hearing to be conducted in an atmosphere and under circumstances free from bias and prejudice. *Morgan v. United States*, 304 U.S. 1, 19-20 (1938)

Section 402(b) of the Communications Act of 1934 as amended, 47 U.S.C. §402(b), insofar as it is pertinent, provides "an appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court

of Appeals for the District of Columbia . . . by any applicant . . . for renewal of an existing radio license . . . whose application is refused by the Commission." It is clear from a reading of this section that appellant as a condition precedent to obtaining any relief under it against the injurious false statements contained in the Blue Book will be required to obtain a denial of an application for renewal of license of WBAL (or of some other application, refusal of which is appealable under that section). Only following such a denial would appellant be in a position to contend in this Court that it had not had a fair hearing before the Commission because of the injurious false statements contained in the "Blue Book." This Court then would be required to pass upon the contention on a record made on issues specified by the Commission which do not raise the question of whether the "Blue Book" allegations are true or false. Notwithstanding that the scope of review in this Court under Section 402(b), of the Commission's denial of an application may be broad enough to permit the Court to set aside such a decision on a showing that there has been a denial of due process and fair hearing, it is clear that the purpose of such an appeal is not to provide judicial relief against injurious false statements made by the Commission outside the record and its decision on the application appealed. It is equally clear that the relief collaterally afforded against the injurious false statements on such an appeal is limited to the setting aside of the unfair refusal to grant the application, and is not designed nor intended to afford any relief against other injury flowing from the false statements. Obviously no court would term the special statutory procedure adequate and this is enough to justify recourse to the courts under Section 10(b) of the Administrative Procedure Act.

The Administrative Procedure Act Confers a Right Upon Appellant to Maintain and Jurisdiction Upon the District Court to Entertain the Instant Suit.

Section 10(b) of the Administrative Procedure Act (Act of June 11, 1946, 60 Stat. 243, 5 U.S.C. 1009(b)) which makes the Declaratory Judgment Act (28 U.S.C. § 400) applicable to the instant case, provides:

Section 10(b). *Form and Venue of Proceedings.*—

The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs or prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

The legislative history of this section leaves no room for doubt that in this statute the Congressional intention and the plain meaning of the language used were the same.

HR. 1980, 79th Cong., 2d Sess., contains the following statement with reference to Section 10(b) of the Bill which was enacted with immaterial modifications as the Administrative Procedure Act.

“The first sentence of this section (10(b)) is an express statutory recognition and adoption of the so-called common-law actions as being appropriate and authorized means of judicial review, operative whenever special statutory forms of judicial review are either lacking or insufficient. Declaratory judgment procedure, for example, may be operative before statutory forms of review are available and may be utilized to determine the validity or application of any agency action. By such an action the court must determine the validity or application of a rule or order, render a judicial declaration of rights, and so bind an agency upon the case stated and in the absence of a reversal.

only special review proceedings wholly created by statute, but so-called common-law forms referred to and adopted by other statutes as the appropriate mode of review in given cases. The provision respecting "prior, adequate, and exclusive * * * review" in the second sentence is operative only where statutes, either expressly or as they are interpreted, require parties to resort to some special statutory form of judicial review which is prior in time and adequate to the case."

SR 752, 79th Cong., 1st Sess. contains the following statement:

"The first sentence of this subsection is an express statutory recognition of the so-called common-law actions as being appropriate and authorized means of judicial review, operative whenever special forms of judicial review are lacking or insufficient. The declaratory judgment procedure, for example, may be operative before statutory forms of review are available; and in a proper case it may be utilized to determine the validity or application of agency action. The expression "special statutory review" means not only special review proceedings wholly created by statute, but so-called common-law forms referred to and adopted by statute as the appropriate mode of review. The exception from "prior, adequate, and exclusive * * * review" in the second sentence is operative only where statutes, either expressly or as they are interpreted, require parties to resort to some special statutory form of judicial review which is prior in time and adequate to the case."

(These statements may be found on pages 276 and 212-213 respectively of Senate Document No. 248 (79th Cong. 2d Sess.) entitled "Legislative History" of the Administrative Procedure Act.)

In view of the absence and inadequacy of the special statutory review proceedings provided in the Communications Act, the above-quoted Section 10(b) of the Administrative Procedures Act is applicable and authorizes the instant proceeding.

Section 10(a) of the Administration Procedures Act Provides "Any person suffering legal wrong because of any agency action . . . shall be entitled to judicial review there-

of." It is a commonplace that the United States had not, prior to the Administrative Procedure Act, given its consent to be sued in all cases where "legal wrong" has been done to private citizens by governmental agencies. See *Ainsworth v. Barn Ballroom Co.*, 157 F. 2d 97 (C. C. A. 4th, 1946). Consent is however clearly given in such cases by Section 10(a). Great pains were taken by the Congress to leave no doubt on this point.

In the course of the Senate debate on the Administrative Procedures Act, Senator Austin asked several questions of Senator McCarran, Chairman of the Committee on the Judiciary of the Senate and Manager of the Bill, who was reporting out the Bill, and explaining its provisions.* These questions were put for the explicit purpose of clarifying the intent of the statute for "the future of those practicing under this estimable bill." Senator Austin's questions and Senator McCarran's answers make it clear the Act is designed specifically to make available a remedy in cases where existing statutes fail to provide for judicial review, as distinguished from cases where such statutes explicitly prohibit judicial review.** The following two excerpts squarely and unambiguously dispose of this point:

- (1) "Mr. Austin. Is it not true that among the cases cited by the distinguished Senator were some in which no redress or no review was granted, solely because the statute did not provide for a review?

Mr. McCarran. That is correct.

Mr. Austin. And is it not also true that, because of the situation in which we are at this moment, this bill is brought forward for the purpose of remedying that defect and providing a review to all persons who suffer a legal wrong or wrongs of the other categories mentioned?

Mr. McCarran. That is true; the Senator is entirely correct in his statement." (Sen. Doc. No. 248, *supra*, p. 311).

*Sen. Doc. No. 248, *supra*, p. 308 *et seq.*

**"To preclude judicial review under this bill a statute, if not specific in withholding such review, must, upon its face, give clear and convincing evidence of an intent to withhold. A mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review." (Sen. Doc. No. 248, *supra*, p. 275)

- (2) "Mr. Austin. In the event that there is no statutory method now in effect for review of a decision of an agency, does the distinguished author of the bill contemplate that by the language he has chosen he has given the right to the injured party or the complaining party to a review by such extraordinary remedies as injunction, prohibition, quo warranto, and so forth?"

Mr. McCarran. My answer is in the affirmative. That is true." (Sen. Doc. No. 248, *supra*, p. 325).

There can be no question in view of the explicit language of the Act and the foregoing specific declaration of Congressional intention that the Administrative Procedure Act was enacted for the very purpose of affording remedies in situations where prior to the Act no judicial relief was available because of lack of consent on the part of the United States to suit.

It is clear, therefore, that if the complaint alleges a "legal wrong" within the meaning of Section 10(a), consent of the United States to suit against the Federal Communications Commission has been given. The fact that the challenged "Blue Book" statements are false is admitted on the Motion to Dismiss, as are the allegations of injury to the appellant's business and reputation. In fact, the Commission conceded in the court below that the complaint sufficiently alleges a libel. In the Senate debate referred to above, Senator Austin raised the question of whether the term "legal wrong" in Section 10(a) was broader than the term "legal injury." Senator McCarran stated that the term included the well-known concept "legal injury" and adopted the definitions in Bouvier's Law Dictionary read into the record by Senator Austin as applicable to the term "legal wrong" in Section 10(a).^{*} It cannot be denied, therefore, that a "legal wrong" has been alleged.

The Congressional intention to provide a remedy in the Administrative Procedure Act, Act of June 11, 1946, 60 Stat. 237, 5 U. S. C. §§ 1001 *et seq.*, for injurious false state-

^{*}Sen. Doc. No. 248, *supra*, pp. 308-310.

ments by a government agency is plain from the language of the Act and is reinforced by reference to the Committee reports explaining in detail its provisions. Section 10(a) of the Act provides:

“Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.”

“Legal wrong” is defined in Section IV, Explanation of Provisions, of the Report of the Committee on the Judiciary of the House of Representatives as being “such a wrong as is specified in Section 10(e).” The same definition is found in Section IV, Analysis of Provisions, of the Report of the Committee on the Judiciary of the Senate. (These statements may be conveniently found in Senate Document No. 248, 79th Cong., 2d Sess., Administrative Procedures Act, Legislative History, at p. 276 and p. 212). Section 10(e) of the Act reads:

“Scope of Review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may

be cited by any party, and due account shall be taken of the rule of prejudicial error."

It is clear that the court has the jurisdiction and duty to "hold unlawful" the Commission's injurious alleged false statements (the allegations being admittedly true for the purpose of the Motion to Dismiss) if it finds them unwarranted by the facts.* It is clear that the facts are subject to trial *de novo* by the court in this case, since the Commission was neither required to, nor did it, hold any hearing or make any record as a basis for the issuance of its Report "Public Service Responsibility of Broadcast Licensees." (Sec. IV, Explanation of Provisions, Report of Committee on the Judiciary, House of Representatives, dealing with Section 10(e) found in Senate Document 248, 79th Cong., 2d Sess., pp. 279-280).

CONCLUSION.

For the foregoing reasons, the appellant respectfully asks this Court to reverse the decision of the District Court, dismissing the complaint herein, and to remand the cause to the District Court for further proceedings in accordance with the judgment of the Court.

Respectfully submitted,

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* The specific concern of Congress to provide for relief against unwarranted damaging public statements by government agencies is evidenced by the following statement in the Report of the Committee on the Judiciary of the House of Representatives, which states under IV, Explanation of Provisions, in connection with Section 9(a) of the Act prohibiting imposition of unauthorized sanctions: "One troublesome subject in this field is that of publicity, which may in no case be utilized directly or indirectly as a penalty or punishment save as so authorized. Legitimate publicity extends to the issuance of authorized documents, such as notices or decisions; but apart from actual and final adjudication after all proceedings have been had, no publicity should reflect adversely upon any person, organization, product, or commodity of any kind in any manner otherwise than as required to carry on authorized agency functions and necessary in the administration thereof. It will be the duty of agencies not to permit informational releases to be utilized as penalties or to the injury of parties." (Sen. Doc. No. 248, *supra*, p. 274).

APPENDIX.

Statutes Involved.

The sections of the Communications Act of 1934, as amended, and of the Administrative Procedure Act which are involved in this appeal are:

Section 402(b) of the Communications Act of 1934, as amended:

(b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

Section 10, Administrative Procedure Act:

Judicial Review of Agency Action

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

Rights of Review (a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Form and Venue of Proceedings (b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdic-

tion. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Acts Reviewable (c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

Relief Pending Review (d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

Scope of Review (e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction,

authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

No. 9599

United States Court of Appeals

DISTRICT OF COLUMBIA

HEARST RADIO, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

BRIEF FOR APPELLEE

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*United States Court of Appeals
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United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9599

HEARST RADIO, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

BRIEF FOR APPELLEE

STATEMENT OF FACTS

This is an appeal from a judgment of the District Court dismissing, for want of jurisdiction, an action by appellant for a declaratory judgment that it is entitled to a retraction of certain allegedly false statements concerning it contained in a report issued by the Federal Communications Commission, and for an injunction against the holding of a scheduled hearing on its application for renewal of license for the operation of Radio Station WBAL pending a determination of its right to a retraction.

The relevant facts, as they appear from the complaint and other pleadings before this Court, are as follows: On March 7, 1946, the Commission issued a report entitled "Public Service Responsibility of Broadcast Licensees" (generally referred to by appellant as the "Blue Book").¹ As is stated in Part I of the report, it was the result of an investigation instituted by the Commission on April 10, 1945, in connection with its

¹ The report, in its entirety, is before this Court as Exhibit "A" of Appellee's Opposition to Motion to Restore Preliminary Injunction Pending Appeal.

announced intention of developing a more detailed method of review of the program performances of broadcast licensees in passing upon applications for renewal of licenses. In furtherance of this investigation radio stations were required to submit certain program data to the Commission to aid in the investigation. Included among the stations from whom information had been requested was WBAL whose license was due to expire on April 30, 1945, and who had applied for a renewal on February 16, 1945 (J. App. 7).

Part ID of the Commission report of March 7, 1946, contained a comparison of the statements of program policy submitted to the Federal Radio Commission in 1927 by the Consolidated Gas, Electric Light and Power Company of Baltimore, the previous licensee of WBAL, in support of a claim for a clear channel, with the programs actually broadcast by WBAL during the week of April 23, 1944, while under license to the plaintiff (J. App. 14-20). The section of the report dealing with plaintiff, which it has attached as an exhibit to the complaint, does not purport to be a complete evaluation of the over-all operation of WBAL under the plaintiff, nor does it express any opinion as to whether WBAL was or was not being operated in the public interest. As appears from the report, no Commission action in connection with any license or application of WBAL was ordered or recommended by the report, and a study of Part ID in the context of the entire report indicates clearly that the discussion concerning WBAL was merely an illustration of "the extent to which the service rendered by a station may be affected by a transfer or assignment of license to a purchaser and the need for integrating Commission transfer and renewal procedures"—one of five illustrations contained in the report of the occasions when a detailed review of program service by the Commission was appropriate.²

² The report states (page 3) :

"The need for detailed review on renewal can best be illustrated by a series of specific instances. The cases which follow are *not* presented for any substantive light they may throw on policy with respect to program service. Part III of this report will deal with substantive program service matters. The following cases are set forth to show various occasions for detailed review on renewal rather than principles in terms of which such review is proceeded."

Part IA discusses an illustration for the need of comparing promises with performance when acting on renewal of licenses. Part IB illustrates the need for review of the past operations of stations which have been granted a license over competing applicants on behalf of the stations' proposed program policy. Part IC concerns an example of the necessity for review of the operations of stations which have been granted increased facilities on the basis of their proposals to provide certain types of praiseworthy programs not otherwise available for broadcast. And Part IE illustrates the necessity for more detailed review where a station has made representations concerning its proposed program policy in the course of court actions, and the courts in reliance thereon have overruled Commission denial of the station's application for a license.

On February 15, 1946, before the adoption of its report, the Commission, being unable to determine that the grant of license renewal to WBAL would serve the public interest, convenience, or necessity, set the application for hearing, as required by Section 309 (a) of the Communications Act (J. App. 7). Subsequently, the Commission called upon WBAL for an analysis of its operations for the week of June 2-9, 1946, but upon the basis of this additional information the Commission was still unable to determine that the public interest would be served by a grant of license renewal to WBAL without hearing (J. App. 9). On September 17, 1946, while the order setting plaintiff's application for hearing was still pending before the Commission, the Public Service Radio Corporation filed an application for a construction permit for a radio station in Baltimore to operate on the frequency 1090 kilocycles now assigned to WBAL, with the same power and hours of operation. Since the two applications were mutually exclusive, the Commission, on November 20, 1946, ordered that the two applications be heard in a consolidated hearing, which, prior to the commencement of these legal proceedings, was scheduled to commence on February 25, 1947 (J. App. 8).

On December 13, 1946, plaintiff filed a petition with the Commission requesting the Commission to make an investigation of what it alleged were false, distorted, or misleading compari-

sons between the operation of WBAL by plaintiff and by its predecessor and to make retraction of the allegedly unfair statements (J. App. 10). On December 20, 1946, the Commission denied this petition in an order which pointed out that the Commission's decision to grant or deny WBAL's application would be based on the record made at the scheduled hearing (J. App. 11). At this hearing, the applicant would have ample opportunity to show whatever it deems to be the facts relating to the operation of WBAL under either Hearst or the Gas Company ownership. On January 24, 1947, plaintiff filed another petition with the Commission to correct the alleged defamatory matter in the report and for a stay of further proceedings on the Public Service Broadcasting Corporation application pending such correction (J. App. 11). On February 8, 1947, the Commission denied this petition on the grounds stated in its order of December 20, 1946 (J. App. 11).

On February 15, 1947, plaintiff brought this action for "declaratory and incidental relief" in the United States District Court for the District of Columbia. In its complaint, plaintiff alleged that the discussion of its operation of Station WBAL in the Commission's report was false and misleading and had subjected the plaintiff to public contempt, contumely, and obloquy. It claimed further that the statements concerning the operation of WBAL in the report were the direct cause for setting WBAL's renewal application for hearing rather than being granted without hearing, and that the statements led to the filing of the application by the Public Service Broadcasting Corporation, and the Commission's order consolidating consideration of the two applications into one comparative hearing. Finally, plaintiff alleged that it would be unable to receive any fair consideration of the merits of its application by the Commission unless and until the alleged misstatements were corrected or withdrawn (J. App. 2-13). However, appellant's complaint contains no allegations making out a factual showing that the Commission would make a determination on its application for renewal on any basis other than the record made after hearing; that appellant would not have a complete opportunity on the hearing to present the complete picture of WBAL's operation under its ownership and under

the ownership of the predecessor Gas Company; that appellant would in any way be deprived of the opportunity to appeal to the Courts under the provisions of Section 402 (b) of the Communications Act of 1934, 47 U. S. C., Sec. 402 (b), from any adverse decision of the Commission after the hearing; and that appellant's operation of Station WBAL would be jeopardized in any way pending a determination of its renewal application.

On February 18, 1947, the Commission filed a petition with the District Court requesting it to convene a three-judge court under the provisions of Section 402 (a) of the Communications Act and the Urgent Deficiencies Appropriations Act of October 22, 1913 (38 Stat. 219) (J. App. 21-23). Oral argument on this petition and on plaintiff's request for a preliminary injunction pending trial on the merits was held before Justice Goldsborough on February 19, 1947. At the conclusion of this argument Justice Goldsborough denied the Commission's request that he convene a three-judge court to hear the action and issued a preliminary injunction restraining the Commission from taking any further action with respect to the appellant's renewal application pending trial and decision of the court action on its merits (J. App. 24-25). On April 4, 1947, the appellee moved in the District Court to dismiss the action on the grounds that the court lacked jurisdiction of the subject matter and the complaint failed to state a claim upon which relief could be granted. It simultaneously filed a second motion requesting the District Court to convene a three-judge court (J. App. 26-27). Oral argument was held on the above motions before Mr. Justice Proctor of the District Court on April 21, 1947.

On July 3, 1947, the District Court filed a memorandum opinion denying appellee's motion for a three-judge court and granting its motion to dismiss the action (J. App. 27-28). Formal orders in conformity with this opinion were signed by Justice Proctor on July 11, 1947 (J. App. 29). Prior to the entry of the order dismissing the action and dissolving the preliminary injunction which had been granted on February 19, appellant requested the District Court to continue the

preliminary injunction pending an appeal to the Circuit Court of Appeals for the District of Columbia. After hearing counsel for both parties on this request the District Court denied the request of appellant and issued the order dismissing the action and dissolving the preliminary injunction (J. App. 29). On the same day the appellant filed a notice of appeal to the Circuit Court of Appeals for the District of Columbia from the decision and order of the District Court dismissing the action and dissolving the preliminary injunction.

On July 14, 1947, the appellant moved this Court to restore the preliminary injunction pending appeal. Opposition to this motion was filed by the appellee on July 21, 1947, and reply to the opposition was filed by the appellant on July 29, 1947. On September 25, 1947, this Court denied appellant's motion for a stay pending appeal.

SUMMARY OF ARGUMENT

I

In its complaint, appellant alleges that it is suffering injury to its reputation from erroneous statements contained in the Commission's report, but it does not make any contention that the issuance of the report was beyond the authority of the Commission. It is well settled that no cause of action based on libel exists against the government, its agencies, or officers and employees for possible errors of fact or judgment in statements made in reports issued in the performance of official duties. *Spalding v. Vilas*, 161 U. S. 483; *Glass v. Ickes*, 73 App. D. C. 3, 117 F. 2d 273. This consistent refusal to recognize the existence of a cause of action in tort based on injury allegedly inflicted by statements in an official report is based on a recognition that to permit suits of this type would substantially impair the performance of official duties. It has been expressly held that alleged injury such as impairment of credit and business standing, claimed to flow from false statements in an official report which does not command or forbid action or otherwise impose any legal requirement, does not constitute injury cognizable by a court of equity as a ground for injunctive relief. *United States v. Los Angeles S. L. Ry. Co.*, 273 U. S. 299. Since appel-

lant's claim of injury from false statements in an official report does not state a cause of action, none can be created by couching the legally insufficient allegation in the form of a prayer for declaratory judgment. *Aetna Life Insurance Co. v. Haworth*, 300 U. S. 227, 240-241.

Appellant claims that this well-settled body of law barring suits based on the alleged incorrectness of facts in reports lawfully issued is inapplicable in this case because Sections 10 (a), (b), and (e) of the Administrative Procedure Act now permit the bringing of such an action. These provisions of the Administrative Procedure Act and their legislative history reveal, however, that they do not purport to work changes in existing substantive law, but rather state in statutory form principles already judicially established with respect to access to the courts and scope of judicial review in statutory and non-statutory review proceedings.

II

Since no present injury of a type cognizable by a court of equity is alleged, no grounds exist for judicial interference in the proceedings on appellant's application for renewal of its radio station license. Appellant's claim, that it seeks no such interference because it requests as final relief a declaratory judgment only and not an injunction, is unconvincing. A declaratory judgment in the form requested by appellant would have precisely the same effect as an injunction. And it is well settled that, where injunctive relief is inappropriate, the same result may not be achieved by indirection by the use of a declaratory ruling. *Macauley v. Waterman Steamship Co.*, 327 U. S. 540.

No ground exists in this case for departure from "the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers v. Bethlehem Shipbuilding Co.*, 303 U. S. 41, 50-51. Certainly, speculation as to possible future prejudice in the hearing on appellant's application for renewal of license affords no such ground. Until determination of a hearing appellant may continue the operation of its station without jeopardy. And if,

in determining the case upon the record made at the hearing, the Commission should refuse to grant appellant a renewal of license, appellant may take an appeal as prescribed by statute under Section 402 (b) of the Communications Act. In connection with such an appeal appellant could apply to the Commission and the courts for authorization to continue operation of its station pending the determination of the appeal.

Appellant's claim that the Commission acted improperly in setting its application down for hearing because it was influenced by erroneous facts in the report affords no basis for interfering with the holding of the hearing. The action of the Commission in setting an application down for hearing is an exercise of discretion conferred on it by Section 309 (a) of the Communications Act, and is the type of action which the courts have consistently held cannot properly be made the subject of judicial review until a final determination is reached.

III

A substantial jurisdictional issue is presented by the prayer of appellant's complaint for a declaratory judgment that it is entitled to have further proceedings before the Commission on its application for renewal held in abeyance until the Commission should retract the allegedly false statements in the report of March 7, 1946. For, this is in substance a request that the court enjoin or suspend an order of the Commission setting a matter down for hearing. An order of the Commission which is not the subject of an appeal pursuant to Section 402 (b) of the Communications Act may not be enjoined or suspended by any court other than a three-judge District Court pursuant to the provisions of Section 402 (a) of the Communications Act of 1934.

ARGUMENT

In its brief, appellant has set out a copious discussion of its reasons why it believes the particular grounds given by the court below for its dismissal of the action are erroneous. How-

ever, the brief fails to establish that the complaint states any claim upon which relief can be granted.

In its complaint, appellant has presented two claims for relief based on the Commission's report of March 7, 1946. Appellant does not allege that the issuance of this report is itself unlawful action. Its first claim is that the report contains statements which, appellant alleges, are false and which inflict injury to its business and reputation in the community, and therefore it is entitled to retraction of these statements in the report. Its second claim is that the allegedly false and misleading nature of the report may result in prejudice to appellant in a hearing on its application for renewal of station license, and that therefore appellant is entitled to have further proceedings on its application suspended until the offending language is either corrected or retracted. Appellant does not allege that the continued operation of its station is jeopardized in any way pending a final decision on its application for renewal.

The court below has held that the action must be dismissed for want of jurisdiction since the granting of the relief sought would entail interference with administrative proceedings on appellant's application for renewal of license which are not yet completed (J. App. 27-28). Appellant contends that this ground is erroneous because it is suffering present injury from the damage to its reputation and the possibility of prejudice in future proceedings caused by the allegedly false statements; therefore the proceedings before the Commission, and subsequent judicial review under Section 402 (b) of the Communications Act afford no adequate remedy. The decision of the Court below completely disposes of any present claim for relief based on speculation concerning possible prejudice in a future proceeding. And, appellant fails to establish that a claim of injury to reputation resulting from allegedly false statements contained in an official report lawfully issued is the type of injury against which a court of equity may grant relief.

I. A report issued by a Federal agency in the exercise of its statutory functions may not be the subject of a claim for relief based on libel

A. No cause of action based on libel exists against the Government, its agencies, or officers and employees for statements made in reports issued in the performance of official duties

In its complaint, appellant alleges only that statements concerning it contained in the Commission's report of March 7, 1946, are erroneous as a matter of fact.³ It does not allege that the issuance of the report was beyond the authority of the Commission. Nor does it allege that the Commission's investigation, in gathering data for the report was outside the scope of its statutory functions, or that the proposed implementation of its licensing procedure, as announced in the report, was not within the scope of the Commission's functions in performing the licensing responsibilities imposed on it by Section 309 (a) of the Communications Act. Indeed, the authority of the Commission, under the provisions of Section 403 of the Communications Act,⁴ to institute and carry on investigations in furtherance of its licensing powers under Section 309 (a) of the Act is well settled and not subject to challenge. *Stahlman v. Federal Communications Commission*, 75 App. D. C. 176, 126 F.2d 124; Cf. *Federal Trade Commission v. Claire Furnace Co.*, 274 U. S. 160.

³ Appellant insists that by its motion to dismiss, the Commission admits the falsity of the statements in the report which are challenged by appellant (Br. 21). Needless to say, on a motion to dismiss the allegations of fact in the complaint are assumed to be true only for the purpose of determining whether a cause of action exists.

⁴ Section 403 reads as follows: "The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. The Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had, excepting orders for the payment of money."

Where a report is issued in the performance of statutory functions, a claim that statements contained in the report may be erroneous in fact affords no basis for establishing that the issuance of the report is beyond lawful authority. *U. S. v. Los Angeles S. L. Ry. Co.*, 273 U. S. 299, 314. Appellant's pleadings thus present a claim that injury to its reputation is inflicted on it by statements, alleged to be factually erroneous, contained in a report lawfully issued by the Commission. But a showing of unlawful official action which is capable of judicial redress is an indispensable prerequisite to securing judicial relief. And it is well established that the infliction of injury of this type as the result of allegedly false statements in a report which is lawfully issued is not of itself illegal action against which courts may afford relief.

Appellant does not seriously contend that any proceeding in the nature of a libel action for redress of injury resulting from allegedly false statements contained in an authorized report, could have been brought against a government agency or officer prior to the enactment of the Administrative Procedure Act, 60 Stat. 243. Indeed it has been settled beyond question that no action lies against the government or its constituted agencies arising out of an alleged tort of libel, and that no such action may be brought against the individual officers or employees of the government by reason of any statement made in the performance of their official duties.

Although the United States has given its consent for suit in claims arising out of contract in the Court of Claims since 1855, and for certain torts in the admiralty, maritime, and patent fields by subsequent legislation, until the passage of the Federal Tort Claims Act in 1946, 60 Stat. 843, 28 U. S. C. 921 *et seq.*, no action could be brought against the United States arising out of any of the common-law torts, including libel. The only avenue for redress available in the case of tort claims generally was by way of introduction of a private-claim bill in Congress. See Senate Report No. 1400, 79 Cong. 2d Sess., pp. 29-31. The Tort Claims Act, *supra*, did not alter the situation with respect to actions against the government arising out of allegedly libelous statements contained in an official report. On the contrary Section 9 of that Act expressly excepted from the Act's

coverage "any claim arising out of * * * libel, slander, misrepresentation * * *." Among the reasons given by the Senate Committee in charge of the bill for making the specified exceptions in the Act was that it was not intended to cover "claims which relate to certain governmental activities which should be free from the threat of damage action. * * *"
Senate Report No. 1400, 79 Cong. 2d Sess. And this is the very ground upon which courts have consistently refused to permit suits of this type, not only against the government and its agencies, but also against officers as individuals.

For, the refusal of the courts to recognize the existence of a cause of action in tort based on injury allegedly inflicted by statements in an official report is not alone grounded in the bare doctrine of sovereign immunity. It is also rooted in a recognition that to permit suits of this type would substantially impair the performance of official duties. *Spalding v. Vilas*, 161 U. S. 483; *Mellon v. Brewer*, 57 App. D. C. 126, 18 F. 2d 168; *DeArnaud v. Ainsworth*, 24 App. D. C. 167; *Glass v. Ickes*, 73 App. D. C. 3, 117 F. 2d 273, cert. denied 311 U. S. 718; *Jones v. Kennedy*, 73 App. D. C. 292, 121 F. 2d 40, cert. denied, 314 U. S. 665. These cases make it clear that the infliction of injury as the result of false statements contained in an authorized report does not of itself constitute unlawful action against which a court may grant redress. For in other situations, where the courts have found that the official action inflicting injury was unauthorized or otherwise unlawful, they have permitted injunction and other actions against the officials as individuals, and have not recognized the claim of sovereign immunity as applicable. *Philadelphia Co. v. Stimson*, 223 U. S. 605.

In the case of *Glass v. Ickes*, *supra*, the Secretary of the Interior had issued a public press release concerning the activities of the plaintiff before the Department of the Interior, which was alleged to be false and misleading and injurious to the plaintiff's reputation. This Court, in dismissing the suit for failure to state a cause of action, held that statements made "more or less in connection with the general matters committed by law to his control or supervision" are absolutely privileged from liability because of the possible defamatory nature of the

statements. It quoted with approval the Supreme Court's earlier statement in *Spalding v. Vilas*, 161 U. S. 483, 498 that:

In exercising the functions of his office the head of an executive department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as intrusted to the executive branch of the government if he were subjected to any such restraint.

The Court thus held that the sole issue to be determined was whether the particular administrative action which led to the publication of the alleged libel was made by the officer in connection with his duly assigned functions, and if it were, no cause of action would lie. And in *Jones v. Kennedy*, 73 App. D. C. 292, 121 F. 2d 40, this Court has specifically applied the rule of the *Spalding v. Vilas* and *Glass v. Ickes* cases to the regularly assigned actions and duties of independent federal agencies. Thus, in the instant case, since there is no dispute that Commission's report was made in the course of the performance of its statutory functions, no right of relief can be based on any allegedly false statements contained in it.

It has been expressly held that alleged injury, such as impairment of credit and business standing, claimed to flow from erroneous statements in an official report which does not command or forbid action or otherwise impose any legal requirement, does not constitute injury cognizable by a court of equity as a ground for injunctive relief. In the case of *United States v. Los Angeles S. L. R. Co.*, 273 U. S. 297, the court held that a final valuation report of the Interstate Commerce Commission, which did not itself command or forbid action but was rather the basis for further administrative proceedings on rate making, was not a final order reviewable by statutory review proceedings under the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 219. The carrier also contended that the suit should be entertained under the general equity power of the

court, and urged two arguments, thus summarized by the Court (273 U. S. at 314):

One is that since the Commission has by reason of errors of law and of judgment grossly undervalued the property, its report will, unless suppressed, injure the credit of the carrier with the public. The other is that the Commission may itself be misled into illegal action by the erroneous conclusions and may apply them to the carriers' injury, since use of the final valuation is required in making rates * * *

The Court concluded that "neither argument is persuasive" and stated further that (273 U. S. at 314):

No basis is laid for relief under the general equity powers. The investigation was undertaken in aid of the legislative purpose of regulation. In conducting the investigation, and in making the report, the Commission performed a service specifically delegated and prescribed by Congress. Its conclusions, if erroneous in law, may be disregarded. But neither its utterances, nor its processes of reasoning, as distinguished from its acts, are a subject for injunction.

Appellant's allegations of injury in its complaint are in substance identical with those passed on in the *Los Angeles* case, *supra*. In that case, the carrier sought to have the Commission's report enjoined and annulled. In the instant case, appellant states that it seeks no permanent injunction as final relief, it seeks only a declaration of its right to a retraction. But it is evident that, as a matter of substantive law, where no action for damages will lie against the officer for statements in a report, and no injunction may be issued against the agency requiring that the report be set aside, certainly no right to a retraction can exist.⁵

⁵ Any judicially enforceable right to a retraction is unknown in the law of libel, and certainly in equity, *Finnish Temperance Society v. Riivaaja Publishing Co.*, 219 Mass. 28, 106 N. E. 561. In the law of libel, retraction may be considered as a factor in mitigation of damages, and some states make statutory provision for the effect of retraction on damages. See Chaffe, *Possible New Remedies for Errors in the Press*, 60 HARVARD LAW REVIEW 17-26.

And where no right of action exists as a matter of substantive law, none can be created by couching the legally insufficient allegations in the form of a prayer for a declaratory judgment. For the declaratory judgment authorized by the Federal Declaratory Judgments Act, 28 U. S. C. 400, merely constitutes an alternative remedy in appropriate cases, where a legally sufficient cause of action exists, and the existence of the cause of action giving the court jurisdiction must be established independently of the form of the relief sought. *Aetna Life Insurance Co. v. Haworth*, 300 U. S. 227, 240-41; *West Publishing Co. v. McColgin*, 138 F. 2d 320, 323-324; *Thompson v. Moore*, 109 F. 2d 372, 373; *American Automobile Insurance Co., v. Freundt*, 103 F. 2d 613, 617.

B. The Administrative Procedure Act does not create a cause of action for allegedly erroneous statements in an official report

Appellant contends that this well-settled body of law barring suits based on the alleged incorrectness of facts in reports lawfully issued is inapplicable in this case because Sections 10 (a), (b), and (e) of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C., 1001 *et seq.*, now permit the bringing of such an action.⁶ These provisions of the Administrative Procedure Act and their legislative history, reveal however that they do not purport to work changes in existing substantive law, including that governing the liability of agencies and officers in connection with lawfully issued reports. These provisions, rather, state in statutory form principles governing access to the courts, and the scope of judicial review where access is permitted, as developed by the courts in interpreting statutes making provision for judicial review of administrative action, and in passing on situations where

⁶ It may be noted, however, that the Federal Tort Claims Act, 28 U. S. C. Sec. 948 (h), which expressly negatives any consent to suit against the United States on tort claims based on libel, was passed by Congress on July 26, 1946, and was approved by the President on August 2, 1946, while the Administrative Procedure Act was passed by Congress on May 27, 1946, and approved by the President on June 16, 1946.

review of administrative action was sought in the absence of any statutory review provisions.⁷

Appellant's supposition that the Administrative Procedure Act does more arises from two basic misconceptions which pervade its brief. The first is the failure to distinguish between factual injury, as such, whether caused by lawful or unlawful action, and legally erroneous action which may inflict factual injury. This misconception is reflected in its reading of Section 10 (a) and (e) of the Administrative Procedure Act. The second misconception is the failure to distinguish between the inquiry whether a cause of action exists in a particular situation and the determination as to what form of action is appropriate for securing access to the courts where a cause of action is claimed to exist. This confusion is embodied in appellant's interpretation of Section 10 (b) of the Act.

Section 10 (a) provides that any person "suffering *legal wrong* because of agency action or adversely affected or aggrieved by such action within the meaning of any statute shall

⁷ See Department of Justice Memorandum: Questions and Answers Re S. 7, 92 Cong. Rec. A2987, included at p. 415 in Senate Document No. 248 (79th Cong., 2nd Sess.) entitled *Legislative History of the Administrative Procedure Act*.

"Section 10 as to judicial review does not, in my view, make any real changes in existing law. This section in general declares the existing law concerning judicial review. It is an attempt to restate in exact statutory language the doctrine of judicial review as expounded in various statutes and as interpreted by the Supreme Court. I know that some agencies are quite concerned about the phraseology used in Section 10 for fear that it will change the existing doctrine of judicial review which has been settled for the particular agency concerned. I feel sure that should this section be given the interpretation which is intended, namely, that it is merely a restatement of existing law, there should be no difficulty for any agency. We may in a sense look at Section 10 as an attempt by Congress to place into statutory language existing methods of review."

See also statements of Carl McFarland, Chairman of the Committee on Administrative Procedure of the American Bar Association, in hearings before the House Committee on the Judiciary, 79th Cong., 1st Sess., Sen. Doc. No. 248, pp. 83-84, and letter of Attorney General to Chairman of Senate Judiciary Committee, Oct. 19, 1945, Sen. Doc. No. 248, p. 224.

be entitled to judicial review." [Emphasis added.] The phrase "legal wrong" was placed in the Act specifically to negative any supposition that the Act created a cause of action against any agency whenever a person had suffered injury as a result of agency action, without regard to whether the agency action was valid or invalid.⁸ It is significant that the phrase "legal wrong" was not in the original Senate draft of the Administrative Procedure Act, and Section 10 (a), as introduced, read "any persons adversely affected by any agency action shall be entitled to judicial review thereof in accordance with this section." See S. 7, 78th Cong., 1st Sess., as introduced January 6, 1945. But this all-inclusive language was rejected and the present terminology restricting judicial review to persons

⁸ See remarks of Senator Austin in debate on bill in the Senate, quoted in Senate Document No. 248 (79th Cong. 2nd Sess.) at p. 309. In the course of these debates Senator Austin questioned Senator McCarran, author of the bill, concerning the exact meaning of the term "legal wrong" pointing out that the term "wrong" has been defined in Bouvier's law dictionary as "in its broad sense it includes every injury to another independent of the motive causing the injury." Senator Austin pointed out that "the adjective 'legal' must be construed as a limiting adjective and as applied in jurisprudence to 'injury' has been defined as a 'violation of some legal right and is distinct from 'damage' which is harm or loss sustained by injury" (quoted from Words and Phrases, fourth series, second volume, p. 548). Senator Austin therefore requested Senator McCarran to clarify for future practitioners whether the category of persons entitled to review under Section 10 (a), was supposed to include any person who had suffered in the manner described in the Bouvier definition of "wrong" or was more narrowly limited. Senator McCarran's answer to this question is illuminating:

"Mr. McCARRAN. Taking Bouvier [defining 'wrong'] and Words and Phrases [defining 'legal injury'] combined and taking the decisions of the courts of last resort to whose language we have access I should answer the Senator 'yes.' That is, I take into consideration all the definitions which apply to define that term, and I respectfully refer to the committee report, which I read a moment ago. It means that something more than mere adverse personal effect must be shown; that is, that the adverse effect must be an illegal effect." (Sen. Doc. No. 248, 79th Cong. 2nd Sess., pages 308-310).

Directly after making the remarks quoted above, Senator McCarran read the comments of the Attorney General on Section 10 (a) referred to below, (footnote 9) that the Section "reflects existing law."

"suffering a legal wrong" or "adversely affected or aggrieved by such action *within the meaning of any statute*" was substituted.⁹

The extent of appellant's confusion between factual injury, as such, and legally erroneous action, or "legal wrong" inflicting factual injury is illustrated by an examination of the case of *Ainsworth v. Barn Ballroom Co.*, 157 F. (2d) 97 (C. C. A. 4th), cited in its brief.¹⁰ In that case, naval and military authorities issued regulations declaring specified establishments, among them the Barn Ballroom, "out of bounds" to enlisted personnel, and stationed military police outside of the Ballroom to enforce the regulations. The Ballroom Company brought suit for an injunction, alleging that the action taken was without color of legal right, and that as a result of the presence of the military police "civilian personnel refused to enter, to the total loss of plaintiff's investment of \$20,000." The District Court entertained jurisdiction and granted a preliminary injunction, holding that "The question whether the Board in its action overstepped its jurisdiction was a judicial question which the Court

⁹ In explanation of this more restrictive language of Section 10 (a), the House Report on the bill (H. Rept. No. 1980, 79th Cong. 2nd Sess.) stated:

"The phrase 'legal wrong' means such a wrong as is specified in Section 10 (e). It means that something more than mere adverse personal effect must be shown in order to prevail—that is, that the adverse effect must be an illegal effect. Almost any governmental action may adversely affect somebody—as where rates or prices are fixed—but a complainant, in order to prevail, must show that the action is contrary to law in either substance or procedure." (Sen. Doc. No. 248, 79th Cong., 2nd Sess., p. 276.)

A similar statement is made in the Senate Report on the bill, S. Rept. No. 752, 79th Cong., 2nd Sess., quoted in Sen. Doc. 248, p. 212. And the Attorney General in commenting on the language of Section 10 (a) in a letter to the Chairman of the Senate Judiciary Committee stated that "this reflects existing law." Sen. Doc. No. 248, p. 230. Since the Attorney General's comments were incorporated in the Senate report on the bill (S. Rept. No. 752, quoted in Sen. Doc. No. 248, pp. 223-231) and is not contradicted in the report, they must be taken as a further indication of the Senate Committee's opinion on the intended effect of the legislation. Cf. *American Stevedores v. Porello*, 330 U. S. 446, 67 S. Ct. 847.

¹⁰ This case is cited for the proposition that "It is a commonplace that the United States has not prior to the Administrative Procedure Act given its consent to be sued in all cases where 'legal wrong' has been done to private citizens by governmental agencies" (Appellant's Br., p. 27).

had the right to examine into * * *” In holding that the District Court was without jurisdiction to entertain the suit, as one against the United States *because* the action taken was within the lawful authority of the War and Navy Departments, Chief Judge Groner stated (157 F. (2d) 97, 100):

We think this assumed too much, for it must be remembered that the sum of the complaint is no more than that as an incident of defendants' order prohibiting the use of the dance hall by enlisted men, civilian patrons "refused to enter" the place. This is very far from charging an unlawful trespass or invasion of appellee's property, as was the case in *Philadelphia Co. v. Stimson*, 223 U. S. 605, 32 S. Ct. 340, 56 L. Ed. 570, but is rather a challenge of the official discretion of appellants in the exercise of authority over the Army and Naval personnel under their respective commands. If the order was within the discretionary authority of the heads of the War and Navy Departments, duly delegated to appellants, the consequential damage which followed the making and enforcing of the order clearly would not create a justiciable controversy. This is so, even if it be conceded there was an abuse of discretion. And has been pointed out time and again, the courts may not invade the executive departments to correct alleged mistakes arising out of abuse of discretion. For to do so would interfere with the performance of governmental functions and vitally affect the interests of the United States.

Far from saying, as appellant supposes, that sovereign immunity barred access to the courts where "legal wrong" or legally erroneous action inflicting injury existed, the *Ainsworth* case, on the contrary, states that where action causing injury is done without legal authority, a suit against officers thus acting unlawfully is not subject to the objection that the suit is one against the United States. This is clearly stated by Chief Judge Groner in the following passage (157 F. (2d) 101):

Stated in its simplest terms, the rule by which courts are controlled in situations analogous to those obtaining here is that where the defendant-official is engaged in something which the law authorizes him to do, or, is acting pursuant to valid authority validly conferred, the suit will be held to be against the United States. But where the authority to do the particular act had not been conferred, or constitutional power to confer it is lacking, the suit is not subject to the objection that it is against the United States.

Appellant's failure to establish that the Commission acted without legal authority in issuing the Report is also decisive of its reliance of Section 10 (e) which provides, in part:

Scope of review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be * * * (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court.

Appellant's argument seems to be that when an agency makes errors of fact in a report issued in the exercise of lawful authority, those erroneous statements constitute legal wrong because they are "unwarranted by the facts" within the meaning of Section 10 (e) (B) (6),¹¹ and the correctness of the facts stated in the report are subject to trial *de novo* in the District Court, since the report was not issued on the basis of an administrative hearing and record. But again, it is evident that a trial *de novo* to ascertain the correctness of facts can be authorized only where an appropriate cause of action is alleged. Thus an

¹¹ This argument is based on a statement in the House and Senate Reports that "legal wrong" means such a wrong as is specified in Section 10 (e). Sen. Doc. No. 248 (79th Cong., 2nd Sess.), pp. 212, 276.

erroneous determination as to facts may, in some situations, put the action taken outside the scope of the agency's legal authority. And where the determination was made without an administrative hearing and record, the court may, on a trial *de novo*, determine whether the determination is within statutory authority or beyond it.¹² See, e. g., *Waite v. Macy*, 246 U. S. 606. But this is quite different from a situation where, as in this case and the *Ainsworth* case, *supra*, injury is alleged to flow from error of fact or judgment alone in the performance of functions admittedly within the authority of the agency. As the discussion above shows (pp. 10-15), under existing law, where the issuance of a report is authorized, a court does not acquire jurisdiction to try *de novo* the correctness of the facts contained in the report on the basis of allegations that they are erroneous and inflict injury.

It is clear that Section 10 (b), on which appellant also relies, does not come into play unless a cause of action of some kind is alleged. Section 10 (b) provides:

Form and venue of action.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence of inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings

¹² The sixth clause was thus intended only to state the existing rule that in cases where judicial review is already authorized, and where there has been no hearing to determine the facts on the part of the agency involved, that the "substantial evidence rule," incorporated into the Act by the preceding fifth provision of 10 (e) for cases subject to the requirements of Sections 7 and 8 of the Act, does not apply and the court may take further evidence on the facts in the course of its review. See Senate Report on the bill, Sen. Rept. 1980, in Sen. Doc. No. 248 (79th Cong., 2nd Sess.), p. 279. The Attorney General's comments on Section 10 (e) (B) appended to the Senate Committee Report on the bill, states clearly and unequivocally that "This declares the existing law concerning the scope of judicial review." Sen. Doc. No. 248 (79th Cong., 2nd Sess.), p. 230.

for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

This section deals only with the form and venue of actions. It certainly does not provide in any way, as appellant supposes, that claims of injury which were formerly not actionable in either statutory or non-statutory review proceedings because they failed to allege that the injury resulted from unlawful administrative conduct may now be entertained by the courts. What Section 10 (b) does do is to formulate, in statutory form, the existing principles evolved by the courts with respect to the appropriate form of action for securing access to the courts for review of administrative action.¹³

Knowledge of the state of the law at the time of the enactment of Section 10 (b) serves to dispel any supposition that Section 10 (b) for the first time removes the bar of sovereign immunity to make available injunction, declaratory judgment, or other similar proceedings where special statutory review proceedings are absent or inapplicable. These remedies have long been available in situations where an appropriate cause of action was alleged.¹⁴

¹³ Representative Walter in explaining the bill in House debate stated that the provisions of the section merely "summarize the situation as it is now generally understood" and constitutes a "statutory adoption of *traditional forms of action* in cases where Congress has made no contrary provision for judicial review." 92 Cong. Rec. 5654, quoted in "Administrative Procedure Act—Legislative History," Senate Document 248 (79th Cong., 2d Sess.) at page 369. And when it was suggested that they might possibly be interpreted as providing a new form of review in *de novo* cases, the Senate Committee on the Judiciary pointed out that the recognition of the so-called common law type of review was in accord with "the authoritative statement of existing law" set forth by the committee in its explanation of the section as including two kinds of review, "(a) Those contained in statutes and (b) those developed by the courts in the absence of legislation." Senate Judiciary Committee Print, June 1945, quoted in Sen. Doc. No. 248 (79th Cong., 2d Sess.) at pp. 36-37.

¹⁴ It has long been recognized that an action for an injunction is available against administrative officers where it is alleged that injury is inflicted by official action which is not lawfully authorized, and no statutory remedy is available. *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94; *Philadelphia Co. v. Stimson*, 223 U. S. 605. Such a suit may also be

Similarly, non-statutory remedies have been made available because of the inadequacy of statutory remedies on the basis that a cause of action claiming injury from unlawful action was alleged, and the statutory remedy would not afford the type of relief required or would so delay review as to make it impossible to give effective relief.¹⁵ But where the statutory method of relief has been held to be unavailable because no matured cause of action was alleged, it has been expressly held that the presence of injury resulting from an authorized exercise of functions, such as the issuance of a report, is not sufficient to make non-statutory methods of review applicable. *United States v. Los Angeles S. L. Ry. Co.* 273 U. S. 299.

Since appellant has utterly failed to establish any cause of action as a matter of substantive law, the provisions of section 10 of the Administrative Procedure Act do not serve to remedy this deficiency. These provisions were designed to give form to principles governing access to the courts already judicially established, and were not at all intended to supplant existing substantive law with a formless and indefinable right of action based on any and every allegation of injury.

brought by declaratory judgment proceedings. *Perkins v. Elg*, 69 App. D. C. 175, 99 F. (2d) 408, *affirmed*, 307 U. S. 325; *Borak v. Biddle*, 78 App. D. C. 374, 141 F. (2d) 278, *cert. denied*, 323 U. S. 738. The possibility of mandatory relief in appropriate situations was recognized by the courts. See *Miguel v. McCarl*, 291 U. S. 442; *Perkins v. Elg*, *supra*; *Borak v. Biddle*, *supra*.

In all cases of this type, where the courts have entertained jurisdiction, it was on the basis that the invalidity of the action challenged makes unavailable the claim of sovereign immunity. And in rejecting jurisdiction in other cases they have pointed out that where official action is taken within limits of lawful authority, the infliction of injury, even through error, does not of itself destroy the barrier of sovereign immunity and create a right of action in the person injured. This is lucidly explained in *Ainsworth v. Barn Ballroom Co.*, 157 F. (2d) 97, discussed *supra* (p. 18).

¹⁵ Thus, in *Utah Fuel Co. v. National Bituminous Coal Commission*, 306 U. S. 56, the Commission ordered disclosure of confidential cost data in the course of a hearing. It was contended that the Commission had no statutory authority to require the disclosure, and that if review of this order were deferred until the entry of a final order on the determination of the proceedings, when the statutory review would be available, the injury resulting from disclosure would be inflicted and irremediable. The Supreme Court held that in such a situation the non-statutory review action was appropriate.

II. The District Court properly held that it lacks jurisdiction to interfere with the processing of appellant's application for renewal of station WBAL's station license

In its brief, appellant has advanced no substantial argument to justify judicial interference in any manner with further processing of appellant's pending application for renewal of station WBAL's station license. Instead it has attempted to minimize this aspect of its case, and to deny that its complaint requests any permanent relief which would interfere with the operations of the Commission in carrying out its statutory responsibilities. However, appellant has not only requested a preliminary injunction restraining the Commission from taking any further action on its application pending the final decision of the present case, but in the second of its three prayers for permanent relief has asked for a judicial declaration of its right "to a correction or retraction of the 'Blue Book' insofar as it falsely condemns Hearst Radio, Inc., *prior to any further Commission consideration of or action upon its pending renewal of license application*" (J. App. 13). [Italics supplied.] The fact that appellant has chosen to frame its complaint as a request for a declaratory judgment of its right to have the Commission do something rather than to request the court to issue a mandatory injunction to require the same result does not make its request any less an effort to secure judicial intervention in the administrative process prior to its completion.¹⁶ It has been definitely established that where a court cannot interfere directly with the administrative functions of a governmental agency it cannot achieve the same result by indirection through the use of a declaratory ruling as to what the agency should do.

¹⁶ As a matter of comity toward a coordinate branch of government, the courts have refrained from issuing mandatory processes against executive officers on the basis that it could be expected that a judgment of the court declaring the applicable law would be observed. See *Miguel v. McCarl*, 291 U. S. 442; *Perkins v. Elg*, 307 U. S. 325; *Borak v. Biddle*, 78 App. D. C. 374, 141 F. (2d) 278.

Under these circumstances, even were a mandatory injunction sought by appellant, if a court found merit in the action, it would issue no more than a judgment declaratory of appellant's rights, and would not issue a mandatory injunction unless it were absolutely necessary to do so to make the court's judgment effective.

Macauley v. Waterman Steamship Co., 327 U. S. 540; *Federal Power Commission v. Arkansas Power and Light Co.*, 67 S. Ct. 963, 330 U. S. 802, *reversing* 156 F. 2d 821 (App. D. C.).

The facts in this case make completely applicable "the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers v. Bethlehem Shipbuilding Co.*, 303 U. S. 41, 50-51; *Highland Farms Dairy Co. v. Agnew*, 300 U. S. 608; *Red River Broadcasting Company v. Federal Communications Commission*, 69 App. D. C. 1, 98 F. 2d 282; *cert. denied* 305 U. S. 625. This principle has been repeatedly applied by the courts to attempts to enjoin a holding of a hearing by an administrative agency in circumstances comparable to those presented here. *Myers v. Bethlehem Shipbuilding Co.*, 303 U. S. 41; *Highland Farms Dairy Co. v. Agnew*, 300 U. S. 608; *Federal Power Commission v. Metropolitan Edison Company*, 304 U. S. 375; *Macauley v. Waterman Steamship Co.*, 327 U. S. 540; *Sykes v. Jenny Wren Co.*, 64 App. D. C. 379, 78 F. 2d 729, *cert. denied* 298 U. S. 624; *Monocacy Broadcasting Co. v. Prall*, 67 App. D. C. 176, 90 F. 2d 421; *Black River Valley Broadcasting Company v. McNinch*, 69 App. D. C. 311, 101 F. 2d 235, *cert. denied* 307 U. S. 623; *Sunshine Broadcasting Co. v. Fly*, 33 F. Supp. 560 (D. D. C.).

In the present case the appellant is attempting to bypass the very hearing in which he will be given an opportunity to show what it believes the facts to be concerning the past operation of the station. And its reason for averting the scheduled hearing is not that the Commission has already done any act which prevents the present operation of plaintiff's station or creates an immediate threat of any such result, but rather that the Commission might, in reaching a determination after the conclusion of the hearing, be prejudiced by the statements in the Commission's Report.¹⁷ This fear that the Commission

¹⁷ Appellant suggests that courts may properly interfere with administrative proceedings to prevent possible prejudice in a future hearing by analogy to cases on disqualification of judges for bias and prejudice (Br. 22-23). But this analogy is utterly inapplicable here. The body of law discussed in Point I above makes it clear enough that possible error of fact in a pre-

might in the future deny appellant a renewal of license after the hearing is thus the ground on which it seeks to have the hearing enjoined prior to its commencement. But such an anticipatory fear of an adverse result which may or may not be reached after the conclusion of administrative proceedings does not constitute a basis for bypassing the administrative proceedings, especially where the statute provides for judicial review of any action in denying a license.

As appellant has admitted in his complaint, when action on its renewal application was suspended in April 1945, appellant and the other licensees similarly affected were given a temporary license to permit continued station operation (J. App. 7).¹⁸ No claim is made by appellant that the Commission is in any way threatening to revoke or terminate this authorization until it has arrived at a final determination after a hearing upon appellant's application. In fact, it has been the Commission's consistent practice to grant temporary authorizations, permitting continued operation, to existing stations after expiration of their regular licenses pending the final determination of proceedings in all cases where the applications for renewal have not been disposed of prior to the expiration of the regular license. And this practice of the Commission is now embodied in the requirements of Section 9 (b) of the Administrative Procedure Act, 60 Stat. 237.

If upon the determination of the hearing the Commission should grant appellant's application for renewal of its license, appellant would be entitled to continue uninterrupted operation of its station under its renewal of license, and its anticipations of injury would be unfulfilled. If, however, the Commission should at that time decide that a denial is warranted appellant would be entitled to take an appeal from the

liminary official report lawfully issued cannot be the basis for suspending further administrative action or securing other relief. See *United States v. Los Angeles & S. L. Ry. Co.*, 273 U. S. 299, 314.

¹⁸ While appellant does not so state in his complaint, the Commission's official records show that its temporary authorization was to remain effective, unless the Commission previously arrived at a final determination of its case, until May 1, 1948. Appellant is presently operating by authority of such temporary license.

Commission's decision, as authorized by the provisions of Section 402 (b) of the Communications Act. In connection with such an appeal, appellant could, pursuant to the provisions of Section 10 (d) of the Administrative Procedure Act, apply to the Commission for a stay or postponement of the effective date of its decision. And in connection with such pending appeal, under Section 402 (b) of the Communications Act, the reviewing Court would be authorized to exercise all equitable powers necessary for the preservation of its jurisdiction and prevention of irreparable injury. *Cf. Scripps-Howard v. Federal Communications Commission*, 316 U. S. 4; Administrative Procedure Act, 60 Stat. 237, Sec. 10 (d).

Nor is any presently justiciable issue presented by appellant's contention that discussion of WBAL in the report was responsible for its being set for hearing, that the application would otherwise have been granted without a hearing, and that therefore the offending language responsible for the hearing should be expunged from the report and the WBAL application granted without consideration of the later application of Public Service Broadcasting Company. No applicant is entitled as of right to have its application granted without hearing. The Commission is required by Section 309 (a) of the Act to order a hearing on any application when, upon examination of the application, it is unable to determine that a grant of the application would be in the public interest. The thought processes and reasoning of the Commission in exercising its discretionary power under Section 309 (a) to determine whether or not an application should be set down for hearing are not and cannot be properly the subject of judicial review. *Jacobson v. National Labor Relations Board*, 120 F. 2d 96 (C. C. A. 3). And the applicant is not entitled to object in advance of a hearing called to give all parties an opportunity of presenting the full and true facts, because the facts which it could produce at the hearing might show that the information on the basis of which the Commission originally set the application for hearing was, in fact, erroneous or mistaken. *United States v. Illinois Central Ry.*, 291 U. S.

457; *Federal Power Commission v. Metropolitan Edison Company*, 304 U. S. 375.

It is, therefore, of no moment whether the discussion of appellant's operation of WBAL in the Commission's Report, or some other factors led to the Commission's decision to hold a hearing on the WBAL application. In any case, the Commission was exercising the discretion conferred on it by statute to require a hearing whenever it is unable to determine, in the absence of a hearing, that a grant would serve the public interest. The hearing, itself, provides the necessary protection against hasty or erroneous action by the Commission. And the expense and burden of participation in an administrative hearing which an administrative agency is authorized to conduct, is not sufficient grounds for avoiding the hearing. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51. In the present case, moreover, appellant is apparently willing to go to the burden and expense of producing evidence in court to show why he shouldn't be required to produce the same evidence in the scheduled Commission hearing. It is this very type of anticipation in judicial proceedings of what would be developed in an administrative proceeding which the principle enunciated in the *Myers* case is designed to avoid.

Appellant's claim that the Commission's report was responsible for the filing of the competing application by Public Service Broadcasting, and the Commission's decision to consolidate the two applications in one hearing is equally deficient as a basis for a claim for judicial relief. The Commission is not and cannot be concerned with the motives which induce various persons or groups to apply for a station license. If the application is in the proper form, the Commission is required to consider it on its merits. It is obvious that since the new applicant, Public Service Broadcasting Corporation, requested the facilities of an existing licensee, the Commission could not determine whether the public interest would be served by a grant or denial of the new application without first holding a hearing. The Supreme Court has held that where there are two pending applications which are by their terms mutually

exclusive, the Commission is required to consider them both in a consolidated hearing and may not grant one without hearing and then set the other for hearing. *Ashbacker Radio Corporation v. Federal Communications Commission*, 326 U. S. 327. In the present case, since Public Service Broadcasting submitted their application in proper form while WBAL's renewal application was still pending, the Commission fulfilled the requirements imposed by the *Ashbacker* case by ordering a consolidated hearing of the two conflicting applications.

III. A single judge District Court lacks jurisdiction to take action having the effect of setting aside, enjoining, or suspending actions of the Commission

A substantial jurisdictional issue is presented by the prayer of appellant's complaint for a declaratory judgment that it is entitled to have further proceedings before the Commission on its application for renewal held in abeyance until the Commission should retract the allegedly false statements in the report of March 7, 1946. For, as is shown above (point II, pp. 24-25) this is in substance a request that the court suspend or enjoin an order of the Commission setting a matter down for hearing. The issue is thus presented whether an order of the Commission which is not the subject of an appeal pursuant to Section 402 (b) of the Communications Act of 1934, 47 U. S. C. § 402 (b), may be the subject of injunctive action by any court other than a three-judge District Court, pursuant to the provisions of Section 402 (a) of the Communications Act of 1934, 47 U. S. C. 402 (a) and Sec. 47 of Title 28 U. S. C.

This issue was raised below when the Commission petitioned for the convening of a three-judge court to consider appellant's request for a preliminary injunction (J. App. 21) and filed a similar petition for the consideration of its motion to dismiss (J. App. 26). These petitions were denied (J. App. 24, 29). Although no appeal was taken from the granting of the preliminary injunction, the question of whether the court below possessed jurisdiction to grant a preliminary injunction is an

issue properly for the consideration of this Court even if it were not raised by the parties. *United States v. Corrick*, 298 U. S. 435, 440.

The requirement of a three-judge District Court in cases involving interlocutory or final injunctions of administrative action, originally imposed by the Urgent Deficiencies Act of 1913, 38 Stat. 208, and extended to those orders of the Commission under Section 402 (a) of the Communications Act not initially reviewable in this Court under Section 402 (b) of that Act, was designed for the very purpose of insuring maximum safeguards against undue interference with the proceedings of agencies and the performance of their functions. *United States v. Griffin*, 303 U. S. 326, 336-337. If an order of the Commission, not of a kind which is reviewable under Section 402 (b) of the Communications Act, may inflict such irreparable injury as to give it characteristics of finality warranting equitable relief pending a final determination as to its validity, it is reviewable by a three-judge District Court pursuant to the provisions of Section 402 (a) of the Communications Act and Section 47 of Title 28 U. S. C., *Columbia Broadcasting System v. United States*, 316 U. S. 407. The requirement of a three-judge District Court for the issuance of an injunction against Commission action is jurisdictional and may not be waived. *Stratton v. St. Louis S. W. Railway*, 282 U. S. 10. And it is the actual relief requested, rather than the form in which the complaint is framed which is determinative of whether jurisdiction properly rests with a three-judge District Court. *Venner v. Michigan Central Railroad*, 271 U. S. 127. Thus, the fact that the suit may be denominated an action for a declaratory judgment is of no significance. *Rolls Royce, Inc., v. Stimson*, 56 F. Supp. 22 (D. D. C.). Although appellant, in this action denominates its suit as an action for a declaration of its right to a retraction, it is also asking that an order of the Commission setting its renewal application down for hearing be suspended and enjoined. Appellant is thus asking for relief of a type which it may appropriately seek only from a three-judge District Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court below properly dismissed the complaint for want of jurisdiction.

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REPLY BRIEF FOR APPELLANT

IN THE

United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 9599

HEARST RADIO, INC., *Appellant,*

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

Appeal from the District Court of the United States for the
District of Columbia.

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REPLY BRIEF FOR APPELLANT.

The Commission, in its brief, has sought to support the dismissal of the complaint on grounds other than those relied on by the court below which were shown to be insufficient in appellant's brief. The Commission has advanced a jurisdictional contention which, if accepted by this Court, would require a conclusion that the court below did not even have jurisdiction to dismiss the complaint herein. In this

reply brief, we will deal briefly with those arguments advanced by the Commission which are not responsive to appellant's brief.

I.

The Commission, in its brief (Appellee's Brief, Point III, Page 29, *et seq.*) suggests that a substantial jurisdictional question is involved in this case, namely whether the complaint herein was one cognizable solely by a three-judge court, pursuant to Section 402(a) of the Communications Act, and was therefore not cognizable by the District Court, a single judge sitting. This question was first raised by the Commission by a petition to the District Court requesting it to convene a three-judge court under the provisions of Section 402(a) of the Communications Act and the Urgent Deficiencies Appropriations Act of October 22, 1913 (38 Stat. 219) (J. App. 21-23). Argument on this petition and on plaintiff's request for a preliminary injunction, *pendente lite*, was held before Justice Goldsborough of the District Court on February 19, 1947. Justice Goldsborough denied the petition for a three-judge court and granted the preliminary injunction. (J. App. 24-25). The Commission did not seek to invoke any appellate intervention to obtain a reversal of the denial of its petition for three-judge court, notwithstanding that reversal of the order denying the petition for three-judge court would also have required the setting-aside of the preliminary injunction as beyond the jurisdiction of a single judge. A second motion requesting the District Court to convene a three-judge court was filed by the Commission on April 4, 1947 simultaneously with a motion to dismiss the complaint herein. In its brief in support of this motion for a three-judge court, the Commission pointed out (and on the argument appellant conceded):

"It is irrelevant to a consideration of this petition by the Commission for a three-judge court whether or not any of the prayers of plaintiff's complaint state a cause of action. For it is well established that in cases where a three-judge Court is required by law, a single judge

is without jurisdiction to dismiss the action for failure to state a cause of action or for any other reason, and such dismissal must be ordered by the appropriate three-judge court. *Home Furniture Co., et al. v. United States*, 2 F. 2d, 765 (W. D. Texas, 1924), aff'd 271 U. S. 456; *Hudson & Manhattan R. Co. v. United States*, 28 F. Supp. 137 (S.D.N.Y., 1939). Cf. *Stratton v. St. Louis S. W. Railway*, 282 U. S. 10, 15; *Ziffrin, Inc. v. Martin*, 24 F. Supp. 924 (E.D. Ky., 1938)."

Notwithstanding the fact that Mr. Justice Proctor was, assuming the Commission's contention with respect to a three-judge court to be correct, without jurisdiction to entertain the motion to dismiss, the Commission nevertheless argued such motion and submitted it for decision by Justice Proctor along with its second motion for convening of a three-judge court. It is clear, therefore, that this jurisdictional argument is only a make-weight, and is not seriously relied upon by the Commission.

Further evidence that the point is not seriously presented by the Commission is to be found in the fact that the Commission in its brief on appeal follows its argument that a three-judge court was required with the conclusion that the Court below "properly dismissed the complaint", whereas if a three-judge court had been required, it should request this Court to dismiss the present appeal on the ground that this Court has no jurisdiction to entertain it. This is clear beyond dispute from the decision of the Supreme Court in *Stratton v. St. Louis S. W. Railway*, 282 U. S. 10, cited not only in the above quotation from the Commission's brief in the Court below but also cited on page 30 of the Commission's brief on appeal. It is inconceivable that the Commission would fail to point out to this Court that the consequence of accepting the Commission's jurisdictional argument would be a mandatory dismissal of the pending appeal on the ground that this Court is without jurisdiction to entertain it and instead argue for affirmance of the order of dismissal entered by the court below, if the Commission conceived its jurisdictional point to have any substance

whatsoever. We will not, therefore, repeat the arguments advanced in the court below in opposition to the petition for three-judge court, beyond pointing out that the Commission's "Blue Book" does not constitute an "order" within the meaning of the Urgent Deficiencies Act so as to make the provisions of that Act with respect to the convening of a three-judge court applicable. *Shannahan v. United States*, 303 U. S. 596; *Shields v. Utah Idaho Central R. Co.*, 305 U. S. 177; *Utah Fuel Co. v. National Bituminous Coal Co.*, 306 U. S. 56.

II.

The Commission, under Point III of its brief, also appears to argue that even if the court would have jurisdiction to entertain a suit for the declaratory relief requested in the complaint herein, any request for injunction *pendente lite*, to prevent the Commission from holding hearings or taking other proceedings with respect to Appellant's pending renewal application, would have to be presented by a separate complaint to a three-judge court. It argues in effect that the Urgent Deficiencies Act shears away the inherent power of the district court to preserve the *status quo* where appropriate pending determination of a case pending before it, if the preservation of the *status quo* involves the issuance of a preliminary injunction directed to the Federal Communications Commission restraining the holding of a hearing, *pendente lite*. This argument smacks of an attempt to revive in all of its antique rigidity the distinction between law and equity and to create a situation where *pendente lite* restraint to preserve the *status quo* pending determination of a case by one court would have to be obtained by recourse to another court. No support for this novel proposal is found either in reason or authority; on the contrary, the decision of the Supreme Court in *Scripps-Howard v. Federal Communications Commission*, 316 U. S. 4, conclusively establishes the fallacy of the argument. In the *Scripps-Howard* case, the Supreme

Court found, from an examination of the inherent judicial power of the Federal courts to issue such processes in cases pending before such courts, that this Court has the inherent power to issue any process including stays and restraining orders, directed to the Commission to preserve the *status quo* pending this Court's consideration and determination of appeals under Section 402(b) of the Communications Act. The decision makes plain the essential difference between the inherent judicial power to maintain the *status quo* and jurisdiction to issue permanent injunctions. The Court explicitly pointed out that the provision in the Urgent Deficiencies Act, made available under Section 402(a), for temporary restraining orders and preliminary injunctions in cases brought thereunder, could not be construed as an expression of Congressional intent to cut of the inherent power of a Court to issue similar process in cases not brought under that statute. Appellant's brief on appeal (Pages 20-21) points out that the injunctive relief sought of the court below in the instant case, was solely for the purpose of maintaining the *status quo pendente lite*.

What has been said here with respect to the Commission's contention in Section III of its brief, is sufficient to dispose also of its contention under its Point II, which is predicated entirely on the erroneous assumption that the *pendente lite* relief requested in the complaint herein is designed to provide for a judicial determination of issues now pending decision in an administrative proceeding on appellant's application for renewal of license of Station WBAL. The Commission's argument under its Point II is summarized in its statement, Page 25, that appellant is seeking to "by-pass" the hearing now scheduled on the renewal application. Nothing could be further from the fact. Appellant is not seeking to by-pass that hearing, nor a determination by the Commission of any issue specified in that hearing. It is seeking only to have removed the false charges levelled against it by the Commission which will prevent any hearing held by the Commission, prior to the

correction of the false charges, from being a fair and impartial one. That these false charges are not in issue in the hearing scheduled by the Commission, cannot be properly answered in such hearing and, not being in issue, will not be decided in such hearing, demonstrates the inapplicability of cases cited by the Commission (*Myers v. Bethlehem Shipbuilding Co.*, 303 U. S. 41, and the other cases referred to in Appellee's Brief, p. 25), in which judicial determination was sought of the very facts in issue in an administrative proceeding. Nor do the cases of *Sykes v. Jenny Wren Co.*, 64 App. D. C. 379, 78 F. 2d 729, and other similar decisions referred to on page 25 of Appellee's brief have any application. Those were cases in which equitable relief was denied because of the existence of an adequate remedy at law, and in this case it is conceded by the Commission that appellant has no adequate remedy at law. In fact, the Commission contends that appellant has no remedy whatever against the injury flowing from the Commission's false charges. Furthermore, the presence or absence of remedy at law is not a bar to the granting of declaratory relief. Rule 57, F. R. C. P.; *Peoples Bank v. Eccles*, (D. C. D. C., 1946) 64 F. Supp. 811, 812-813; *Aetna Life Insurance v. Haworth*, 300 U. S. 227 (1937); *Borchard, Declaratory Judgments*, p. 327 *et seq.*; *Anderson, Declaratory Judgments*, Section 27, p. 131 *et seq.*, Section 174, p. 532, and *Cum. Supp.* (1946), p. 192.

III.

In its Point I, the Commission contends that appellant is not entitled to judicial relief against the publication by the Commission of an injurious false statement which, had it been issued by a private person, would constitute actionable libel. In support of this contention the Commission relies heavily on *United States v. Los Angeles S. L. Ry. Co.*, 273 U. S. 299, for the proposition that an erroneous statement contained in a report which a government agency is authorized to make is not actionable, notwithstanding that

damage to a private individual may flow from the erroneous statements in the report. The errors complained of in that case were "errors of law and of judgment", 273 U. S. 299, 314. The Court found the "fundamental infirmity" in the complaint to be the fact that "the mere existence of error in the final valuation is not a wrong for which Congress provides a remedy under the Urgent Deficiencies Act". 273 U. S. 299, 313. The Commission itself does not suggest that anything in the report of the Interstate Commerce Commission, which was the subject of litigation in that case, was of a character remotely resembling libel. In marked contrast it concedes that the allegations of the complaint in this case do make out a libel on the part of the Commission. It is evident, therefore, that the decision in the *Los Angeles* case can furnish no precedent in the instant case.

Apparently recognizing the substantial distinction pointed out above between the instant case and the *Los Angeles* case, the Commission proceeds to a discussion of libel suits against government officers and calls attention to the personal privilege against liability for money damages which the courts have recognized as being available to government officers who make such statements "more or less in connection with their official duties". The policy behind the judicial recognition of such personal privilege against judgment for money damages on the part of government officers is akin to the policy which protects witnesses testifying under oath in judicial proceedings, and protects judges against suits for libel because of statements made in the course of judicial proceedings. The Commission urges that this purely personal privilege which protects government officers against the imposition of judgments for money damages should be extended to protect a governmental agency against a judicial declaration that a defamatory statement in one of its reports is false. It is perhaps significant that the Supreme Court, in the *Los Angeles* case, did not suggest that any such doctrine of privilege would

be a defense in a suit brought against the Interstate Commerce Commission to obtain relief from damage flowing from an erroneous report of that Commission, but on the contrary analyzed the contentions advanced in the complaint to determine whether or not they stated a cause of action cognizable by a court of equity. It is obvious that there is no necessity for the courts to create any parallel privilege protecting an agency of the United States in the way that officers of such agency are protected against personal damage suits, for no agency of the United States can be sued without the consent of the United States and the withholding of such consent would furnish ample protection if the Congress determines that public policy requires that government agencies be permitted to libel citizens and remain immune from judicial declaration of the falsity of the libelous statements.

It is obvious that the reasons for the privilege which cloaks government officers with immunity from personal damage suits have no application to suits for declaratory judgment to establish the falsity of libelous statements in official reports instituted not as personal suits against officers but against agencies of the United States. On the contrary, every sound argument supports the conclusion that the efficient and proper functioning of the executive agencies of the government will be improved, not impeded, by providing for judicial determination of the truth or falsity of defamatory statements contained in reports of such agencies. Congress itself recognizes that the unlawful imposition of sanctions against private persons through the issuance of press releases by the government was a mischief requiring the opening of the courts to persons so injured. The report of the Committee on the Judiciary of the House of Representatives on the Administrative Procedure Bill states "It will be the duty of agencies not to permit the informational releases to be utilized as penalties or to the injury of parties", (Sen. Doc. 248, 79 Cong. Sess. p. 274). Section 10(c) of the Administrative Procedure Act pro-

vides "every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review". The explicit recognition by Congress that the publication of an injurious statement by press release constitutes the imposition of an unlawful sanction within the meaning of Section 9(a) of the Administrative Procedure Act and the unambiguous wording of Section 10(c) expressing the intent of Congress to afford judicial relief against such injury, exposes the Commission's attempt to induce this Court to extend the doctrine of privilege by government officers to embrace government agencies as a flagrant attempt to induce this Court to disregard the public policy established by the Congress and set up a contrary policy in defiance of the Congress.

The Commission's argument that appellant has failed to distinguish between legal wrong and factual damage flowing from a published false statement completely collapses with the exposure of (1) the fallacy of its argument based on the *Los Angeles* case, that since damage resulting from publication of erroneous conclusions not constituting a libel give rise to no cause of action, injury resulting from false statements in a government report which amount to a libel do not give rise to a cause of action, and (2) of the fallacy of its argument that since an absolute personal privilege against judgments for money damages is enjoyed by government officers, a similar privilege should be established (although none of the reasons for the privilege is present) to protect a government agency against judicial declaration of the falsity of libelous statements contained in a published report of such agency.

Conclusion.

The Commission, in its brief, as is shown above, completely fails to establish that the complaint herein does not state a cause of action; that there is any privilege which would prevent a judicial declaration of the falsity of the

statements contained in the "Blue Book"; that the Administrative Procedure Act does not authorize the district court to entertain the complaint herein; and that a single judge of the district court does not have jurisdiction over the proceeding.

WHEREFORE, it is respectfully prayed that the Court, for the reasons stated in Appellant's brief on appeal, reverse the judgment of dismissal entered by the court below and remand the cause for trial.

Respectfully submitted,

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